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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [illegible]

No. [illegible] 31

BENJAMIN W. COREY, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 3, 1962

CERTIORARI GRANTED JANUARY 21, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 569

BENJAMIN W. COREY, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the District of Massachusetts		
Transcript of sentencing proceedings, March 26, 1962	1	1
Statement of counsel for defendant	2	1
Testimony of Dr. David M. Banan	4	3
Transcript of sentencing proceedings, April 9, 1962	10	7
Proceedings in the United States Court of Appeals for the First Circuit	11	9
Notice of appeal	11	9
Statement of docket entries in United States District Court for the District of Massachusetts	12	10
Motion for leave to file typewritten motion for dismissal under Rule 26	13	11

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 26, 1963

	Original	Print
Order granting leave to file	14	12
Motion to dismiss appeal	14	12
Order on probation entered by United States District Court for the District of Massachusetts on July 17, 1962	15	13
Judgment of the United States District Court for the District of Massachusetts, entered on July 9, 1962	16	14
Memorandum opposing motion to dismiss	18	15
Submission of case	23	18
Opinion, Per Curiam	24	19
Judgment	26	21
Petition for rehearing	26	21
Order denying petition for rehearing	28	23
Motion to stay mandate	29	23
Order staying mandate	29	24
Clerk's certificate (omitted in printing)	30	24
Order allowing certiorari	31	24

[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Crim. 61-67-F

FORD, D.J.

UNITED STATES OF AMERICA,

v.

BENJAMIN W. COREY.

Court Room No. Three
Federal Building, Boston

TRANSCRIPT OF SENTENCING PROCEEDINGS OF MARCH 26, 1962

The Clerk: No. 61-67-F Criminal, United States against Benjamin W. Corey.

Mr. Gibson: Your Honor, in this case we don't have any recommendation because of the—according to the notation that the probation report was incomplete.

Mr. St. Clair: If your Honor please, I have here a clinical record from the Veterans Administration Hospital by Dr. Banan. I have Dr. Banan here under subpoena.

The Court: What is the date of that report you have?

Mr. St. Clair: I have a date of 12-1-61.

The Court: I have that. I read that, too. Yes, I did; I read this.

Mr. St. Clair: I have, as I say, Dr. Banan here and [fol. 2] would like to have him, your Honor, tell you first-hand about this case.

The Court: Put him on if you would like to.

STATEMENT OF COUNSEL FOR DEFENDANT

Mr. St. Clair: I would like to, but first I would like to give a little bit of the background of this individual, as I understand it, from what he has told me.

This man was born in Cambridge, Massachusetts of immigrant parents. He attended the public schools in Cambridge and at an early age started to work to support himself and put himself through school and assist his brothers. He has two brothers, both of whom are medical doctors, one in Florida and one here in Massachusetts.

This man attended Harvard College on scholarships and graduated from Harvard College with honors in 1941. During that time he worked in the—under Civil Service appointment in the Post Office and elsewhere.

And in 1941 he went into the service and had, from what he tells me, quite a remarkable military record, having served as a counterintelligence agent in the South Pacific, in Australia, and later was parachuted behind the lines in France as an intelligence agent during the Second World War.

Following his release from active duty, all of which was honorable, as far as I can ascertain, he returned to Cambridge and attended the Harvard Law School and graduated in 1947—in fact was a classmate of mine at that time.

[fol. 3] He rose to the temporary rank of lieutenant colonel in the Army of the United States and had a rank of—permanent rank, I believe, in the Reserves as a captain.

Following his law school career he worked in a patent law firm in Boston and New York for a short time. He then returned to the Harvard Business School for a year and then he went to work in the motion picture-TV field.

With the Korean War he returned, apparently, to active duty and was called by the Pentagon to serve in the capacity as a research and development coordinator.

Following the Korean War he had an unfortunate personal experience and apparently underwent a rather traumatic change. I am not a psychiatrist nor a psychologist, but from that point on he reverted to rather menial labor. He started in repairing radios by hand and eventually got good enough at it so that he owned his own business, which led to the difficulties he is now in.

I think that the doctor might be able to shed some light at least on one aspect of the problem facing your Honor at this time. That is as to what effect a sentence would

have as far as rehabilitation is concerned, and I would like to call Dr. Banan, if I may. Would you call to the stand Dr. Banan?

[fol. 4] DAVID M. BANAN, sworn.

Direct examination.

By Mr. St. Clair:

Q. Would you state your full name, please?

A. David M. Banan.

Q. Are you a medical doctor?

A. I am.

Q. Are you affiliated with the Veterans Administration?

A. I am.

Q. What affiliation do you have there?

A. I am chief of the admissions service.

Q. In the practice of medicine have you specialized at all, Doctor?

A. I have specialized in psychiatry and am a diplomate of the American Board of Psychiatry.

Q. How long have you been a diplomate?

A. Since 1951.

Q. And would you give his Honor a brief synopsis of your background and education, and particularly your professional education?

A. I was graduated from the University of Illinois School of Medicine in 1930. I served an internship at Cook County Hospital, Chicago, and started out my medical career as a pediatrician.

I was with the United States Public Health Service for three years. I served during World War II for six years, and I have been with the Veterans Administration [fol. 5] in exclusive practice of psychiatry ever since.

Q. Are you the author of a report under date of December 1, 1961?

A. I am.

Q. On this case?

A. Yes, I am. There are several reports here. I don't know which one you are referring to.

Q. I will show you a copy of it. Apparently his Honor has it.

A. Yes.

Q. Is that the most recent report on Mr. Corey?

A. That's the most recent complete report, yes. There have been other notations since then.

Q. Can you tell us whether or not, in your opinion, Mr. Corey is in need of continued psychiatric care?

A. I feel that he has been in need of treatment for a long while and he still is in need of treatment, yes.

Q. Would you tell his Honor what kind of treatment and the frequency of it and where it would be available?

A. Well, this treatment is what is usually referred to as psychotherapy, the purpose of which would be for the individual to have made clear to him, through the process of the—the therapeutic process, why he behaves in the manner he does, why he does things that he does, why he feels things and behaves, in order to correct those which need correction.

Q. What kind of—

[fol. 6] A. This is a long drawn-out process which would probably require a minimum of one or two years for further treatment, at least.

Q. Is there any requirement, from your point of view, that he be hospitalized?

A. Not necessarily. Treatment is definitely indicated. Hospitalization, per se, is not.

Q. Where would such treatment as you think he would require be available?

A. There are two sources of treatment that are available to him. He is eligible to receive it through the Veterans Administration on an outpatient basis, and of course he is always eligible to seek it with a private psychiatrist.

Q. Has he been hospitalized in recent months?

A. He has been continuously hospitalized since the first day of December, 1961.

Q. Until—

The Court: Is he there now?

The Witness: He is still there a patient, yes, sir.

Q. Insofar as your professional opinion is concerned, what effect, if any, would a jail sentence have on the rehabilitation of the patient?

A. Well, I think it would be highly undesirable from the point of view of the doctor for two reasons: one is that it is a virtual certainty that if he is incarcerated any place treatment could not and would not take place and even if [fol. 7] it were available I think—again I speak from the point of view of a doctor, could serve no purpose whatsoever in my opinion to put him—to incarcerate him.

The Court: You say there is no place he could get this treatment if he were incarcerated? The United States has hospitals for such people.

The Witness: Yes. Except, sir, that hospitalization or incarceration for this treatment isn't necessary. I think he could get the treatment without necessarily being in a hospital.

The Court: I thought you indicated that the United States did not have the facilities to give him the treatment.

The Witness: Well, they don't have quite as many facilities as they have the reasons to use the facilities.

The Court: Are you sure of that?

The Witness: Pretty certain, sir.

Q. Would you think that hospitalization would cause any damage as far as rehabilitation is concerned?

A. It would be my medical opinion that it would, yes.

The Court: Why wouldn't it be just as much damaging in the Veterans Bureau?

The Witness: I propose to have him discharged from the Veterans Bureau virtually any day.

The Court: Is that for the reason hospitalization is hurting?

The Witness: Not in a positive sense, but in the same [fol. 8] sense a person had a minor injury or illness that needed treatment in a doctor's office once a week and were kept in a hospital, I think injures in a sense there is no pattern of normal living within the framework of a hospital. One isn't employed or does a lot of things he would

in the course of normal living. To that extent hospitalization is not needed.

Mr. St. Clair: That's all I have, if your Honor please.

The Court: I have not a full probation report in this case. I did talk to the probation officer who I now understand has talked with Mr. Corey this morning.

Now, I think, in the light of the circumstances—and consequently I have no advice or help from the District Attorney's office because of that fact, and I will do this: I will put the case over for two weeks. Mr. Griffin, I will ask you then to have a complete probation report. I will ask you, Mr. Penney, to transcribe the notes of the testimony of this doctor so that they may be furnished the District Attorney for further study, and then on April 9th, Mr. Clerk, we will dispose of the case at 12 o'clock.

Mr. St. Clair: If your Honor please, could I hand to the probation department my copy of the clinical report?

The Court: Yes, if you wish. We have a copy of that report, of course.

Mr. St. Clair: You may want to keep that.

The Court: That will remain in the papers until I get [fol. 9] further advice.

Mr. St. Clair: Why don't I hand this to Mr. Griffin for his use.

The Court: No harm in handing that to the probation officer at all. The case will stand until April 9 at 12 o'clock. Eleven o'clock would be better.

Mr. St. Clair: Eleven o'clock, April 9th. Thank you.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 10] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Crim. 61-67-F

FORD, D.J.

UNITED STATES OF AMERICA,

v.

BENJAMIN W. COREY.

Court Room No. Three
Federal Building, Boston

TRANSCRIPT OF SENTENCING PROCEEDINGS OF APRIL 9, 1962

The Clerk: Criminal 61-67-F. United States v. Benjamin W. Corey.

The Court: All ready.

Mr. O'Connor: May it please the Court, this case is in order for disposition. It is the recommendation of the United States Attorney that the defendant be committed to the custody of the Attorney General in accordance with the provisions of Section 4208 (b) of Title 18.

The Court: Are you familiar with this?

Mr. St. Clair: Yes, I have just read it, if your Honor please. Section 4208 (b) obviously is designed to insure at least some supervision by way of treatment for a period [fol. 10a] of time of I think no less than three months.

The Court: Yes.

Mr. St. Clair: As I remember the testimony of the doctor from the Veterans Hospital, he testified that the defendant had been at the hospital since the date of the jury's verdict, which was early in December, and that he was now at the point where he was able to be treated almost as an outpatient.

If this sentence were imposed it would mean in substance he would be enforcibly hospitalized again and I suspect

it would not have any beneficial effect by way of rehabilitation, at least according to the doctor who is in charge of the case at the Veterans Hospital.

It would seem to be far more appropriate he be given a suspended sentence conditioned upon his continuing treatment at the hospital, which could be properly supervised by the probation officer and regular reports could be received and then his current treatment would not be so drastically interrupted and the period of time he has already spent in the hospital, which has been nearly four months, would not necessarily be jeopardized or lost.

It seems to be a far more appropriate sentence under these conditions. Therefore I respectfully request that your Honor suspend any sentence and condition that upon continuing treatment at the Veterans Hospital in the manner [fol. 10b] satisfactory to the probation officer.

The Court: Have you anything to say, Mr. Corey, about the disposition of this matter this afternoon?

The Defendant: My attorney will speak for me, sir.

The Court: You do not care to add anything?

The Defendant: I am not aware of what I could.

The Court: Well, I have done something in the interim with respect to facilities for psychiatric and psychological treatment in our institutions and I have a communication here from our Director of the Bureau of Prisons, Mr. Bennett.

It was my intention when the case came on before to impose a jail sentence. But on hearing evidence adduced by counsel, I decided then, not having a complete probation report, to pause and make some investigation on my own account.

Of course I was familiar then and am familiar now with 4208 (b) and they have adequate facilities to determine these matters. I think it may be a good idea, a progressive idea, for the Court to know something more about the defendant than I have seen or heard up to date. Mr. Clerk.

[The Court confers with the Clerk.]

The Clerk: Benjamin W. Corey, hearken to your sentence as the Court has awarded it against you. The Court orders that you be committed to the custody of the Attorney General of the United States under Title 18,

United States Code, 4208 (b). Mr. Marshal, the prisoner is now in your custody under sentence of this Court.
[fol. 10c] The Court: Just one more remark. In considering the type of sentence, the sentence I would have imposed in this case, I was convinced in my opinion, without the slightest doubt, that a perjured defense was offered in the defense of this defendant.

Next case, Mr. Clerk.

Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 11]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6046

BENJAMIN W. COREY, Defendant-Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

NOTICE OF APPEAL—Filed July 20, 1962

Name and address of appellant:

Benjamin W. Corey, 6 Winter Street, Cochituate, Massachusetts.

Name and address of appellant's attorneys:

Kargman and Kargman, 11 Pemberton Square, Boston, Massachusetts.
[fol. 12] Russell Morton Brown, Brown, Goodpasture, & Block, Federal Bar Building, 1815 H St., N. W., Washington 6, D. C.

Offense: False claims against the Government, Title 18 U. S. Code Section 287.

Concise statement: Defendant was found guilty by jury of 75 counts and committed on April 9, 1962, to

the custody of the Attorney General under Title 18 U. S. Code Section 4208(b).

On July 16, 1962, following report from the Bureau of Prisons, defendant was placed on probation for two years, and released from custody.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the First Circuit from the above judgment of July 16, 1962.

Benjamin W. Corey, Appellant, by Russell Morton Brown, Counsel.

July 19, 1962

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

..... DIVISION

No. 61-67-F

UNITED STATES OF AMERICA,

v.

BENJAMIN W. COREY.

STATEMENT OF DOCKET ENTRIES

1. Indictment for making false claims, knowing same to be false, fictitious and fraudulent in violation of Title 18, section 287		
	Filed	March 13, 1961
[fol. 13]		
2. Arraignment		April 4, 1961
3. Plea to indictment or information Not guilty		April 4, 1961

4. xxxxxxxx xxxxxxxxxxx

5. Trial by jury, Nov. 14, 17, 28, 29, 30, Dec. 1, 1961

6. Verdict of guilty December 1, 1961

7. Order—imposition of sentence suspended and deft. placed on probation for two years

Entered July 17, 1962

8. Notice of appeal filed July 19, 1962

Dated July 19, 1962

Attest Mary K. Shamber, Clerk.

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE TYPEWRITTEN MOTION FOR DISMISSAL UNDER RULE 26—Filed August 10, 1962

Now comes the United States of America, appellee, and moves this Honorable Court that it be granted leave to file a typewritten motion for dismissal in the matter of the appeal of the defendant-appellant, Benjamin W. Corey, from the Order on Probation entered by the United States District Court for the District of Massachusetts on July 17, 1962.

W. Arthur Garrity, Jr., United States Attorney,
By: Thomas P. O'Connor;
Thomas P. O'Connor, Assistant U. S. Attorney;
Attorneys for Appellee.

[fol. 14]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

ORDER GRANTING LEAVE TO FILE—August 10, 1962

Upon motion, Leave is granted to appellee to file in typewritten form under Rule 20 of the Rules of this Court a motion to dismiss appeal (to be treated as a motion to docket and to dismiss appeal) and memorandum in support thereof; and further

Leave is granted to appellant to file in similar form any memorandum in opposition thereto by August 24, 1962.

By the Court:

Roger A. Stinchfield, Clerk.

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

MOTION TO DISMISS APPEAL—Filed August 10, 1962

On April 9, 1962, a judgment of conviction was entered against the defendant-appellant, by the United States District Court for the District of Massachusetts, pursuant to which the defendant-appellant was placed in the custody of the Attorney General and committed by him to the United States Penitentiary at Lewisburg, Pennsylvania. Thereafter, on July 17, 1962, pursuant to the terms and conditions of said judgment of conviction and the statute on which said judgment was based (Title 18, U.S.C. Sec. 4208), the District Court entered an Order on Probation. On July 19, 1962, the defendant-appellant, while on probation pursuant to said order, filed a Notice of Appeal to this Court from the said Order on Probation. The original file of the United States District Court is presently in custody of the Clerk of this Court. Attached hereto and made a part hereof are (a) copy of judgment of the United States District Court for the District of Massachusetts entered on April 9, 1962, and (b) copy of the Order on

Probation entered by the United States District Court [fol. 15] for the District of Massachusetts on July 17, 1962.

The appellee, United States of America, moves that this appeal be dismissed, and for reasons therefor states:

(a) The judgment of conviction sentenced the defendant-appellant to a maximum penalty of 375 years imprisonment and/or fines in the total amount of $750,000.

(b) The defendant-appellant is not aggrieved by the Order on Probation entered July 17, 1962.

W. Arthur Garrity, Jr., United States Attorney,
By: Thomas P. O'Connor;
Thomas P. O'Connor, Assistant U. S. Attorney;
Attorneys for Appellee.

ATTACHMENT TO MOTION

ORDER ON PROBATION

FORD, D.J.

The above-named defendant having been committed to the custody of the Attorney General of the United States or his authorized representative under the provisions of Title 18, U.S.C., section 4208(b), on April 9, 1962, and the report of Classification Study having been submitted to the Court and after oral arguments by counsel and due considerations by the Court; it is

[fol. 16] ORDERED that imposition of sentence be suspended and the defendant, Benjamin W. Corey, be placed on probation for a term of two (2) years.

/s/ AUSTIN W. JONES, JR.,
Deputy Clerk
Order entered July 17, 1962
John A. Canavan, Clerk
by /s/ GRACE V. FLOOD,
Deputy Clerk

/s/ FRANCIS J. W. FORD
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
No. 61-67-F Criminal

UNITED STATES OF AMERICA,

v.

BENJAMIN W. COREY.

ATTACHMENT TO MOTION

On this 9th day of April, 1962, 19 came the attorney for the government and the defendant appeared in person and by counsel,

It is adjudged that the defendant has been convicted upon his plea of not guilty, and a Verdict of Guilty by Jury of the offense of Violation of Title 18, Section 287, USC, made and presented for payment to a department of the United States, the Department of the Army, claims upon and against the Department of the Army, U.S. Government Standard forms 44a purportedly ordering merchandise, indicating receipt of said merchandise and claiming payment therefor, knowing such claims to be false, fictitious and fraudulent, in that the said merchandise was never actually ordered and received by the Department of the Army.

as charged in counts 1 to 75 inc. on the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is ADJUDGED that the defendant is guilty as charged and convicted.

[fol. 17] IT IS ADJUDGED that the defendant is hereby committed to the custody of the attorney General or his authorized representative under the provisions of Title 18, U.S.C. Section 4208(b)

IT IS ADJUDGED THAT

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ FRANCIS J.W. FORD
united states district judge

The Court recommends commitment to:

.....,
Clerk.

[fol. 18]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BENJAMIN W. COREY, Defendant-Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

MEMORANDUM OPPOSING MOTION TO DISMISS—
August 22, 1962

The facts recited in the U. S. Attorney's Motion to Dismiss the Appeal are substantially correct. However, it must be noted that the so-called judgment of conviction dated April 9, 1962, was based on Title 18, U. S. Code, section 4208(b). That statute authorizes commitment to the custody of the Attorney General for an unspecified period, pending a report and recommendations from the Bureau of Prisons within 90 days. This is utilized "If the court desires more detailed information as a basis for determining the sentence to be imposed." [18 U.S.C. sec. 4208(b)] (Underscoring supplied) During this period of study by the Bureau of Prisons the defendant is to be deemed under the maximum sentence, in this case 375 years imprisonment *and* $750,000 fine.

The statute further provides that after receiving the reports and recommendations, the court may (1) place the prisoner on probation, (2) affirm the original sentence of imprisonment, or (3) reduce the sentence and commit the offender under any applicable provision of law.

In the case at bar, the court received and considered the report of the Bureau of Prisons and on July 17, 1962, placed the defendant-appellant on probation. The U. S. Attorney's position is that the entry of April 9, 1962, under [fol. 19] section 4208(b) was a final appealable judgment and the appeal has been lost by failure to give Notice of Appeal within 10 days thereof. The only question here is whether or not the order of April 9 or the order of July 17 was the appealable final judgment which disposed of the case. It will be noted that the order of April 9 specified no term of imprisonment at all. Therein lies the critical distinction between this case and the *Behrens Case*, 190 F. Supp. 799 (D. Ind., 1961), relied upon by the U. S. Attorney. The Indiana court had sentenced the defendant to 20 years imprisonment, but reserved the power to modify if the Bureau of Prisons should so recommend. Accordingly it held there was no right of appeal after the 10 days for giving notice thereof had elapsed. The original sentence simply remained in effect, unless the court should see fit to modify it.

Nothing of the kind happened in the case at bar. No sentence whatever was pronounced. No punishment was imposed, simply a commitment to the Attorney General. The court below was under affirmative statutory obligation to take further action: (1) to suspend and place on probation, (2) to affirm the original sentence, or (3) to reduce the term and re-sentence. It is absurd to claim that the court intended its sentence to be 375 years imprisonment and $750,000 fine. That is clearly shown by the probationary release of defendant on July 17 after the court had been fully advised. This is not different from the old procedure of requesting a *pre-sentence report*, and continuing the defendant at liberty under bond.

So long as the court holds open any inquiry of fact or law, the judgment is not final and cannot be appealed. *Beebe* v. *Russell*, 60 U.S. (19 How.) 283, 285 (1857). Ob-

viously, "tentative decisions" of trial courts are not appeal-
[fol. 20] able. *United States* v. *Smith*, 331 U.S. 469 (1947). The test for criminal as well as civil cases is whether the decision terminates the litigation on the merits, leaving nothing to be done but enforcement of the decree. *Berman* v. *United States*, 302 U.S. 211 (1937).

Nothing could be clearer than the court's desire for information and recommendations from the Bureau of Prisons before imposing sentence, and this is confirmed by the probationary order which was based on the report.

The legislative history of Title 18 U.S. Code, sec. 4208(b), (the Federal Sentencing Act) is found in U.S. Code Cong. & Adm. News, 85th Cong., 2d Sess., 1958, pp. 3891 et seq. It shows beyond question that the purpose was to bring uniformity to sentencing procedures in the federal courts, and to this end the report and recommendations of the Federal Bureau of Prisons were to be available for the court's information and guidance.

That the order of July 17 was the final sentence is shown beyond dispute by Senate Report No. 2013, July 29, 1958 (to accompany H. J. Res. 424):

> "This section [now 4208(b)] would permit the court, in particularly complex cases, to commit the defendant to the Attorney General for a 3- to 6-month study. After the court had received a summary of the Attorney General's findings, it could impose a final sentence under any applicable statute." (Underscoring supplied) [U.S. Code Cong. & Adm. News, *supra*, at p. 3891. Identical language is used in the Conference Report. Id. at p. 3905].

The Congress fully recognized that only *after* the court has received the Attorney General's findings would *final sentence* be imposed. The same reasoning was followed by the Administrative Office of United States Courts, Washington, D. C., in commenting on the legislation [Id. at p. 3897]. By letter of July 21, 1958 it refers to the first [fol. 21] commitment as a "tentative sentence", and says:

"The Judicial Conference feels that the sentencing judge before imposing final sentence should be able to receive, if he deems advisable, a more complete study of the defendant. * * *" (Underscoring supplied)

Since the jurisdiction of this court extends only to final decisions (28 U.S. Code, sec. 1291, 62 Stat. 929, June 25, 1948), the order of July 17, made *after* the court had received the Attorney General's report, is the only one subject to appeal.

This is clearly in accord with sound administration of justice: conceivably the final action might be such as to make appeal undesirable or unnecessary, as where the court might impose a nominal fine or suspend sentence entirely. Why further congest the appellate docket with appeals from tentative sentences?

In the case at bar, the defendant-appellant staunchly asserts his innocence, and feels that serious errors of law denied him a fair trial. Even though the trial court has graciously released him on probation, he seeks to reverse the conviction and clear his name. It is unthinkable that he be denied this opportunity for appellate review on an unwarranted super-technical construction of the sentencing statute.

It is respectfully urged that the Motion to Dismiss the Appeal be denied, and suggest that the Court consider the desirability of oral argument to develop fully the important legal question here involved.

Russell Morton Brown, Attorney for Defendant-Appellant.

August 22, 1962

[fol. 22] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 23] Thereafter, on August 24, 1962, this cause was submitted to Honorable Peter Woodbury, Chief Judge, and Honorable John P. Hartigan, Circuit Judge.

[fol. 24]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6046

BENJAMIN W. COREY, Defendant-Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

On Motion to Dismiss Appeal

Before Woodbury, Chief Judge, and Hartigan, Circuit Judge.

Russell Morton Brown for appellant on memorandum.

W. Arthur Garrity, Jr., United States Attorney, and Thomas P. O'Connor, Assistant U. S. Attorney for appellee on motion to dismiss and memorandum.

OPINION OF THE COURT—September 18, 1962

PER CURIAM. This is a motion by the United States to dismiss, as untimely, defendant-appellant's appeal from a judgment of conviction entered by the United States District Court for the District of Massachusetts.

Defendant was convicted as charged in the indictment of seventy-five offenses of making and presenting for payment to a department of the United States—the Department of the Army—false, fictitious and fraudulent claims in violation of 18 U.S.C. § 287. The maximum penalty for each offense is five years imprisonment or a fine of $10,000 or both.

On April 9, 1962, the district court entered a judgment of conviction against the defendant expressly noting that the judgment was entered pursuant to 18 U.S.C. § 4208(b). [fol. 25] This statute empowers a court for a maximum period of six months to modify a defendant's sentence without being restricted to sixty days, as provided by Rule 35, Fed-

eral Rules of Criminal Procedure. Following the April 9 judgment, defendant was placed in the custody of the Attorney General and committed by him to the United States Penitentiary at Lewisburg, Pennsylvania.

Thereafter, on July 17, 1962, again pursuant to 18 U.S.C. § 4208(b), the district court entered an Order On Probation, suspending sentence and placing the defendant on probation for a term of two years.

Defendant took no appeal from the April 9 judgment but has appealed the Order On Probation entered July 17, 1962. The United States Attorney's position is that the judgment of April 9, 1962, under § 4208(b), was a final appealable judgment and that defendant's right of appeal has been lost by failure to give notice of appeal within ten days thereof.

The defendant contends that under the April 9 judgment "No sentence whatever was pronounced. No punishment was imposed, ..." However, the district court expressly noted that it was acting under the provisions of Title 18, U.S.C. § 4208(b). Under this section the statute clearly states that the term of "commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law." Consequently, at this point the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time that he should have acted. While it is true that defendant could reasonably assume that the judge would modify this maximum sentence, the judge was assuredly under no duty to do so. See *United States* v. *Behrens*, 190 F. Supp. 799 (D.C.S.D., Ind. 1961).

An order will be entered docketing the case and granting the motion to dismiss defendant's appeal.

[fol. 26]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

JUDGMENT—September 18, 1962

Upon consideration of motion to dismiss appeal, memoranda in support thereof and in opposition thereto.

It is ordered that the appeal be, and the same hereby is, dismissed.

By the Court:

Roger A. Stinchfield, Clerk. By: Dana H. Gallup, Chief Deputy Clerk.

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

PETITION FOR REHEARING—Filed October 2, 1962

The Court is respectfully prayed to revise its decision of September 18 ordering the appeal dismissed as being too late. The following grounds are urged:

(1) The District Court need not have reduced the sentence, but it was under affirmative obligation to do *something*:

(a) It had a statutory obligation to receive and consider the report and recommendations of the Bureau of Prisons; and

(b) It had a statutory obligation to pronounce some kind of "final sentence", either affirming the maximum penalty, or reducing or suspending that penalty, or sentencing under any applicable statute.

It must be remembered that the lower Court had simply ordered the Defendant into the custody of the Attorney General "as a basis for determining the sentence to be [fol. 27] imposed". [18 U.S.C. sec. 4208(b)] In the *Behrens Case*, the sentence was 20 years imprisonment: that disposed of the matter completely.

Not so in the case at bar. The Court wanted the views of the Bureau of Prisons before imposing sentence. True it is that by law the Defendant was to be deemed as under maximum sentence, but that was not to be the end. The Bureau of Prisons Report and Recommendation had to be received and considered. Only then could the sentencing act be fully carried out by one of the alternatives specified in the Act. And one of them had to be employed by the lower Court—even if it were to affirm the earlier "tentative" sentence imposed.

It seems clear that the legislative history of the sentencing Act [Title 18 U.S.C. sec. 4208(b)] previously set forth in Defendant-Appellant's Memorandum, must be accorded some weight in interpretation. Clearly it was never intended that the right to appeal be prejudiced or varied without notice; and no such effect was considered possible in view of the terminology in Congressional reports: "Tentative sentence" of commitment to the Attorney General; and

> After the Court had received a summary of the Attorney General's findings, it could impose a *final sentence* under any applicable statute. (Senate Report No. 2013, July 29, 1958).

The Judicial Conference likewise showed that this is the only possible interpretation. It likewise said the study by the Bureau of Prisons should be in the hands of the sentencing judge "before imposing final sentence".

It is respectfully prayed that the Court give the obvious weight to clear language, and recognize the finality of the sentence pronounced on July 9, 1962.

This would cause no disruption in the administration of justice, but simply preserve to this litigant an opportunity for judicial review of his trial—a valuable statutory right which should not lightly be disregarded.

[fol. 28] (2) The *Behrens Case*, 190 F. Supp. 799 (D. Ind., 1961) is not in point and is no precedent for this case; it involved a definite final sentence from which appeal was sought after the ten days provided by law. No second sentencing ever took place, as in the case at bar.

It is respectfully prayed that the Court revise the decision of September 18 ordering this appeal dismissed, and deny the Government's motion to this effect.

Undersigned counsel hereby certifies that this petition for rehearing is presented in good faith and not for the purpose of delay.

Russell Morton Brown, Attorney for Defendant-Appellant.

Brown, Goodpasture & Block, Attorneys and Counsellors at Law, Federal Bar Building, 1815 H. Street, N. W., Washington 6, D. C.

Kargman & Kargman, Attorneys and Counsellors, 11 Pemberton Square, Boston, Massachusetts.

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

ORDER DENYING PETITION FOR REHEARING—October 3, 1962

It is ordered that the petition for rehearing filed by appellant be, and the same hereby is, denied.

By the Court:

Roger A. Stinchfield, Clerk.

[fol. 29]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

MOTION TO STAY MANDATE—Filed October 3, 1962

Comes now Defendant-Appellant, having petitioned the Court for a Rehearing on its Order Dismissing the Appeal, and being desirous of seeking review, if necessary, by the Supreme Court of the United States, and respectfully moves this Court to stay the issuance of mandate until a petition for certiorari can be filed in the Supreme Court.

Russell Morton Brown

October 1, 1962

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

ORDER STAYING MANDATE—October 3, 1962

Upon motion of appellant to stay mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari, the same to be filed by the date prescribed by law, and notice of such filing to be filed promptly with the Clerk of this Court,

It is ordered that said mandate be, and the same hereby is, stayed.

By the Court:

Roger A. Stinchfield, Clerk.

[fol. 30] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 31]

SUPREME COURT OF THE UNITED STATES

No. 569—October Term, 1962

BENJAMIN W. COREY, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—January 21, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted]31

BENJAMIN W. COREY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Federal Rules Involved	2
Statement	2, 3
Reasons For Granting The Writ	4-12
(a) Effect of the statute on the time for appeal should be defined	4-6
(b) The decision below forfeits the right of appeal in disregard of the statutory language	6-8
(c) The legislative history should be evaluated for the guidance of lower federal courts	8, 9
(d) The District Court proceedings plainly show final sentencing was deferred	9, 10
(e) Orderly administration of criminal justice requires settlement by this Court of these procedural questions	11, 12
Conclusion	12, 13

Appendix

Court of Appeals opinion, September 18, 1962	1a-2a
Court of Appeals Order, September 18, 1962	3a
Court of Appeals Order, October 3, 1962, denying rehearing	3a
Rule 32(b), Rules of Criminal Procedure	3a
Rule 35, Rules of Criminal Procedure	3a, 4a
Rule 37(a)(2)	4a
Rule 39(a)	4a
Rule 46(a)(2)	4a, 5a
Title 18, U. S. Code, section 4208(b)	5a
Notice of Appeal, dated July 19, 1962	6a, 7a
District Court Sentencing Procedure of July 16, 1962	7a, 8a

AUTHORITIES CITED

CASES: Page

Beebe v. *Russell*, 60 U.S. (19 How.) 283, 285 (1957) 7
Berman v. *United States*, 302 U.S. 211, 212 (1937) 7, 11
Euziere v. *United States*, 266 F. 2d 88, 91 (C.A. 10, 1959) 11
Grabina v. *United States*, 369 U.S. 426 (1962) 5, 6, 7
Miller v. *Aderhold*, 288 U.S. 206, 210-211 (1933) 7
United States v. *Behrens*, 190 F. Supp. 799 (D. Ind., 1961) 5, 6, 9
United States v. *DeBlasis*, 206 F. Supp. 38 (D. Md., 1962) 5
United States v. *Johnson*, 207 F. Supp. 115 (E.D., N.Y., 1962) 5, 6, 7
United States v. *Smith*, 331 U.S. 469 (1947) 7, 11
United States v. *Tuffanelli*, 138 F. 2d 981, 985 (C.A. 7, 1943) 11, 12

STATUTES, ETC.:

Title 18, U.S. Code
Sec. 287 3
Sec. 4208(b) 2, 3, 4, 6, 8, 9, 12
Sec. 4208(c) 6

Title 28, U.S. Code
Sec. 1254(1) 2
Sec. 1291 9

Federal Rules of Criminal Procedure
Rule 32(b) 2, 7
Rule 35 2, 11
Rule 37(a)(2) 2, 4, 11
Rule 39 2, 11
Rule 46(a)(2) 2, 11

U.S. Code Cong. & Admin. News, 85th Cong., 2d Sess., 1958, pp. 3891 et seq. 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 7

BENJAMIN W. COREY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit dismissing petitioner's appeal September 18, 1962, rehearing denied October 3, 1962.

OPINIONS BELOW

The opinion of the Court of Appeals dated September 18, 1962, is unreported at this time. A copy is appended. (App. pp. 1a-2a). No opinion was written in denying rehearing.

JURISDICTION

The judgment of the Court of Appeals, dismissing the appeal as too late, was made and entered September 18, 1962. A copy is appended. (App. p. 3a). A petition for rehearing was denied October 3, 1962. A copy of the Order of Court denying a rehearing is appended. (App. p. 3a). The jurisdiction of this Court is invoked under Title 28, U.S. Code, section 1254(1).

QUESTION PRESENTED

In computing the 10-day appeal period under Rule 37, Federal Rules of Criminal Procedure, is a final appealable judgment of conviction rendered in accord with Rule 32(b), Federal Rules of Criminal Procedure, when the defendant is "committed to the custody of the Attorney General or his authorized representative under the provisions of Title 18, United States Code, section 4208(b)", which requires study and recommendations "as a basis for determining the the sentence to be imposed".

STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of Title 18, U.S. Code, section 4208(b) and Rules 32, 35, 37, 39, and 46, Federal Rules of Criminal Procedure, are set forth in the Appendix at pages 3a-5a.

STATEMENT

Defendant was convicted by jury of submitting false claims to the Government in violation of Title 18, U.S. Code, section 287. The judgment of the District Court, April 9, 1962, was that he be "committed to the custody of the Attorney General or his authorized

representative under the provisions of Title 18, United States Code, Section 4208(b)". No appeal was taken.

That statute, by its express terms is used "If the court desires more detailed information as a basis for determining the sentence to be imposed". It requires a study and recommendation by the Bureau of Prisons within 90 days. The court received and considered this report, and, in accord therewith, on July 16, 1961,[1] suspended sentence, releasing the defendant on probation. (App. pp. 7a-8a)

Notice of appeal was given July 19, 1962, seeking substantive review of the trial proceedings. (App. pp. 6a-7a). The Government moved to dismiss the appeal on the ground that the original commitment by statute was deemed to be for the maximum sentence authorized by law—375 years imprisonment and fines of $750,000[2]; the Government contended, therefore, the defendant was not aggrieved by the reduction of sentence.

September 18, 1962, the Court of Appeals dismissed the appeal, holding that when the defendant was committed to the custody of the Attorney General for study on April 9, 1962, "the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time he should have acted." Accordingly, the right to appeal was held to be lost when the 10-day period for giving notice expired after April 9, 1962.

---

[1] Proceedings in open court took place July 16, though formal entry is dated July 17. The difference is not material.

[2] This resulted from a finding that 75 false vouchers were submitted; the indictment covered 75 counts. Each is punishable by 5 years imprisonment, a $10,000 fine, or both. Title 18, U. S. Code, sec. 287.

REASONS FOR GRANTING THE WRIT

(a) Effect of the Statute on the Time for Appeal Should Be Defined

An important question of federal criminal law is presented by this case, raising a question which has not been, but will ultimately have to be, settled by this Court. The Federal Sentencing Act was passed August 25, 1958. Neither the language nor the legislative history touches on a change in appellate procedure; still, varying interpretations and uncertainties call for definition. The pertinent part, section 4208(b) of Title 18, U.S. Code, reads as follows:

> "If the court desires more detailed information *as a basis for determining the sentence to be imposed,* the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any *recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case,* shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section." (Italics supplied).

The crucial question is when does the 10-day period begin for giving notice of appeal under Rule 37(a)(2)?

with the commitment for study; or after the study has been completed and acted upon by the trial court? It seems clear enough that final disposition of the matter takes place only after the study has been made.

That was the view of the trial judge in the only case which has reached this Court, *Grabina* v. *United States*, 369 U.S. 426 (1962). In that case the Solicitor General conceded error in a memorandum filed in the case. This memorandum is quoted in 206 F. Supp. 38, 39-40. The Solicitor General said (p. 40):

> "The trial judge obviously believed that he was deferring sentence to await reports under 18 U.S.C. 4208(b), rather than imposing sentence which later would be subject to reduction."

The original commitment was made in the absence of the defendant; so, too, was the final sentence after the reports were received. The cause was reversed for resentencing with the defendant present.

In *United States* v. *DeBlasis*, 206 F. Supp. 38 (D. Md., 1962), where the quoted memorandum appears (pp. 39-40), the trial judge "obviously believed" that he was imposing the maximum sentence, which might, in his discretion, be affirmed or modified after receiving the report and recommendations from the Bureau of Prisons. It was held, therefore, that defendant had no right to be present at the reduction of the sentence following receipt of the Bureau of Prisons reports. The same result was reached on this point in *United States* v. *Johnson*, 207 F. Supp. 115 (E.D., N.Y., 1962), denying the right of the defendant to be present in court after the reports are made. The court affirmed the sentence as the maximum term authorized.

Only one case deals with the right of appeal: *United States* v. *Behrens*, 190 F. Supp. 799 (D. Ind., 1961).

The court had, in so many words, sentenced defendant to imprisonment for a definite term of 20 years. It also required the study prescribed in Title 18, U.S. Code, section 4208(c), and declared the sentence subject to modification in accord with section 4208(b). An attempt to appeal in forma pauperis was dismissed as too late, measuring the 10-day notice of appeal period from the original sentence. So far as appears there was no subsequent sentencing.

It seems that the *Behrens Case* is not in point for the court there obviously had concluded the matter by a sentence of 20 years. It said, "there is now no proceedings (sic) pending before the court". In the case at bar, no term was specified—simply a general commitment under section 4208(b).

Plainly, the trial court here had to do something further—affirm, reduce, or suspend sentence. Certainly it had a statutory obligation to receive and consider the report of the Bureau of Prisons. Under these circumstances the statutory implication of the maximum term is not to be considered the final sentence, but simply a mechanical technique to cover the custodial period of study and hold open for the court's future action the full range of penal authority.

Obviously, the nature of initial commitment may not be left to the state of the trial judge's mind—tentative in the *Grabina Case, supra,* and final in others. The legal right of appeal is too important to rest on such an uncertain base.

(b) The Decision Below Forfeits the Right of Appeal in Disregard of the Statutory Language

Congress authorized the use of this statute "If the court desires more detailed information as a basis for

determining the sentence to be imposed". **The law requires a study and expressly authorizes the Director of the Bureau of Prisons to make *any recommendations which he "believes would be helpful in determining the disposition of the case".***

After the study and recommendations are available, the court must exercise "its discretion", and affirm, reduce, or suspend the sentence. It must do something in a case such as this, where the commitment is for study, without a specified term of imprisonment, even, if it only affirms the maximum as it did in the *Johnson Case, supra.*

The jurisdiction of the Courts of Appeals is limited to "final decisions" of District Courts. By Rule 32, Federal Rules of Criminal Procedure, a judgment of conviction must include the sentence, and where any inquiry of law or fact is left open, that judgment is not final for purposes of appeal. *Beebe* v. *Russell,* 60 U.S. (19 How.) 283, 285 (1857). Obviously, tentative decisions of trial courts are not appealable. *United States* v. *Smith,* 331 U.S. 469 (1947). In a criminal case, final judgment means sentence (*Berman* v. *United States,* 302 U.S. 211, 212 (1937)), and an order which would suspend this indefinitely would be void. *Miller* v. *Aderhold,* 288 U.S. 206, 210-211 (1933). Chief Justice Hughes, in *Berman* v. *United States, supra,* said (p. 213) the judgment is not final until "it terminates the litigation on the merits, leaving nothing to be done but to enforce by execution what has been determined."

Here, the statute simply holds the matter open for 90 days, until the court has received the report and recommendations which it has requested. Then and only then, can the District Court finally discharge its

statutory obligation by (a) receiving and considering the report and recommendations which the Director of the Bureau of Prisons has made to be "helpful in determining the disposition of the case"; and (b) "determining the sentence to be imposed." The matter is then ready for appeal.

(c) The Legislative History Should Be Evaluated for the Guidance of Lower Federal Courts

The legislative history of Title 18, U.S. Code, section 4208(b) (the Federal Sentencing Act), is found in U.S. Code Congressional & Administrative News, 85th Cong., 2d Sess., 1958, pp. 3891 et seq. It shows beyond question that the purpose was to bring uniformity to sentencing procedures in the federal courts, and to this end the report and recommendations of the Federal Bureau of Prisons were to be available for the court's information and guidance.

That the Order on Probation of July 17 was the final sentence is shown beyond dispute by Senate Report No. 2013, July 29, 1958 (to accompany H. J. Res. 424):

> This section [now 4208(b)] would permit the court, in particularly complex cases, to commit the defendant to the Attorney General for a 3- to 6-month study. *After the court had received a summary of the Attorney General's findings, it could impose a final sentence under any applicable statute.*" (Italics supplied). [U.S. Code Cong. & Adm. News, *supra*, at p. 3891. Identical language is used in the Conference Report. Id. at p. 3905].

The Congress fully intended that only *after* the Court has received Attorney General's findings would *final sentence* be imposed. The same reasoning was followed by the Administrative Office of the United States Courts, Washington, D. C., in commenting on

the legislation [Id. at p. 3897]. By letter of July 21, 1958, it refers to the first commitment as a "tentative sentence", and says:

> The Judicial Conference feels that the sentencing judge *before imposing final sentence* should be able to receive, if he deems advisable, a more complete study of the defendant. (Italics supplied)

Since the jurisdiction of the appellate court extends only to final decisions (28 U.S. Code, sec. 1291), the order of July 17, made *after* the trial court had received the Attorney General's report, would seem to be the only one subject to appeal.

(d) The District Court Proceedings Plainly Show Final Sentencing Was Deferred

Unlike the *Behrens Case, supra,* where the sentence was expressly stated as 20 years, the trial court here simply committed defendant to the custody of the Attorney General under section 4208(b) of Title 18, U.S. Code. Defense counsel made no objection, for the record shows substantial psychiatric disability connected with defendant's military service in World War II and in Korea.[3] The court wisely recognized the need for professional study and recommendation "as a basis for determining the sentence to be imposed."

The report and recommendations of the Director of the Bureau of Prisons were received after the defendant had spent some 90 days at the Federal Penitentiary, Lewisburg, Pennsylvania. Whereupon the Court had the defendant brought before it, and said (App. pp. 7a-8a):

---

[3] Petitioner, a member of the Massachusetts bar, was in a state of collapse and hospitalized immediately following the trial.

The Court: Now, Mr. Counsel, as you know as a result of our conferences in my lobby, this case comes back to me with the report concerning the defendant which I have studied and read, and *now it is my duty to dispose of the case at this point, finally.*

* * *

The Court: (Addressing defendant) We have discussed the matter fully for the last half-an-hour in my lobby. But I am compelled to ask you whether or not you wish to say anything in your own behalf *before I impose the sentence I am going to impose.*

* * *

The Court: Then, Mr. Clerk, . . . I am going to place you on probation, Mr. Corey, for two years, and I think *that is a proper dispostion of the case after hearing from the physicians and specialists in the Bureau of Prisons* * * *.

Pass the order, Mr. Clerk, probation for 2 years.

The Clerk: Benjamin W. Corey, hearken to your sentence as the Court orders it against you. * * *. (Italics supplied)

Here the Court carefully allowed the right of allocution, after expressly stating, "Now it is my duty to dispose of the case at this point, finally." This was a full and formal sentencing procedure and completely terminated the trial court's function. Up to that time, it was in suspense awaiting the reports required by statute. Then the Clerk pronounced, "Hearken to your sentence". Only then was the case ready for appeal.

(c) Orderly Administration of Criminal Justice Requires Settlement By This Court of These Procedural Questions

In order to make this statute serviceable, the District Courts must be able to call for the advisory help of the Bureau of Prisons. They cannot do so if the simple act of referring the matter is considered a final appealable judgment. If it be final, notice of appeal must be given within 10 days under Rule 37(a)(2). The entire case is then moved to the Court of Appeals (Rule 39, Federal Rules of Criminal Procedure) to run a course which may extend for a year or more. The District Court's jurisdiction is ended. *United States* v. *Smith,* 331 U.S. 469 (1947); *Berman* v. *United States,* 302 U.S. 211, 214 (1937); *Euziere* v. *United States,* 266 F. 2d 88, 91 (C.A. 10, 1959); *United States* v. *Tuffanelli,* 138 F. 2d 981, 985 (C.A. 7, 1943). Even if the Bureau of Prisons report recommends particular action, the trial court's hands are stayed until the appellate court's mandate is received, possibly years later, and then the only authority is to reduce the sentence under Rule 35, Federal Rules of Criminal Procedure.

The notice of appeal may postpone the study indefinitely, for the appellant is plainly entitled to bail pending appeal. Rule 46(a)(2), Federal Rules of Criminal Procedure. Thus a defendant who desires the benefit of the careful study and evaluation intended by Congress, is forced to appeal and remove the matter from the District Court's jurisdiction, at least pending review.

In the *Smith Case, supra,* this Court directed extraordinary writs of mandamus and prohibition, to prevent a District Judge from exercising jurisdiction after the cause was appealed.

If the referral to the Bureau of Prisons for study be considered a final sentence for the maximum term, then many cases will be appealed, which might otherwise result finally in suspended or reduced sentences, with no appeal. Why congest the appellate courts with tentative decisions which the trial court may, and probably will, reduce on recommendation of the Bureau of Prisons? However, if such be the proper scope of this statute, then this Court should announce it, so that the right of appeal be not lost in many cases by ambiguity in the statute.

Numerous federal prisoners are in custody under section 4208(b) of Title 18, U.S. Code. This enlightened approach to sentencing was adopted by Congress after careful study, with the assistance of this Court's Administrative Officers. It appears that the First Circuit has totally disregarded the legislative history of the law, and given no thought to the effect on the administration of justice. To hold that defendant should have appealed when the case was referred to the Bureau of Prisons for study is to require frustration of the statutory purpose.

On the other hand, a defendant so appealing may well face dismissal on a challenge to the appellate jurisdiction on the ground there is more to be done by the District Court, and the decision below lacks finality. *United States* v. *Tuffanelli*, 138 F. 2d 981, 984-5 (C.A. 7, 1943)

CONCLUSION

Because different federal judges have employed commitment under Section 4208(b) of Title 18, U.S. Code, as a deferment of sentence, and as a final sentence, the time for giving notice of appeal is uncertain.

Proper administration of criminal justice warrants a definitive statement by this Court.

RUSSELL MORTON BROWN,

MAURICE C. GOODPASTURE,
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Date: November 2, 1962

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CERTIFICATE OF SERVICE

I, Maurice C. Goodpasture, a member of the Bar of the Supreme Court of the United States, one of the attorneys for petitioner, hereby certify that on the 2d day of November, 1962, I served a copy of the foregoing Petition for a Writ of Certiorari on the respondent as follows: (1) On the Solicitor General, Department of Justice, Washington, D. C., by mail, postage prepaid, to the above address, and (2) On the United States Attorney for the District of Massachusetts by mail in a duly addressed envelope, with air mail post-

age prepaid, to Thomas P. O'Connor, Assistant United States Attorney, Post Office Building, Devonshire and Water Streets, Boston, Massachusetts.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6046

BENJAMIN W. COREY, *Defendant, Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Motion to Dismiss Appeal

Before WOODBURY, *Chief Judge,* and
HARTIGAN, *Circuit Judge.*

Russell Morton Brown for appellant on memorandum.

W. Arthur Garrity, Jr., United States Attorney, and ***Thomas P. O'Connor***, Assistant U. S. Attorney for appellee on motion to dismiss and memorandum.

Opinion of the Court
September 18, 1962

PER CURIAM. This is a motion by the United States to dismiss, as untimely, defendant-appellant's appeal from a judgment of conviction entered by the United States District Court for the District of Massachusetts.

Defendant was convicted as charged in the indictment of seventy-five offenses of making and presenting for payment to a department of the United States—the Department of the Army—false, fictitious and fraudulent claims in violation of 18 U.S.C. § 287. The maximum penalty for each offense is five years imprisonment or a fine of $10,000 or both.

On April 9, 1962, the district court entered a judgment of conviction against the defendant expressly noting that the judgment was entered pursuant to 18 U.S.C. § 4208(b). This statute empowers a court for a maximum period of

six months to modify a defendant's sentence without being restricted to sixty days, as provided by Rule 35, Federal Rules of Criminal Procedure. Following the April 9 judgment, defendant was placed in the custody of the Attorney General and committed by him to the United States Penitentiary at Lewisburg, Pennsylvania.

Thereafter, on July 17, 1962, again pursuant to 18 U.S.C. § 4208(b), the district court entered an Order On Probation, suspending sentence and placing the defendant on probation for a term of two years.

Defendant took no appeal from the April 9 judgment but has appealed the Order On Probation entered July 17, 1962. The United States Attorney's position is that the judgment of April 9, 1962, under § 4208(b), was a final appealable judgment and that defendant's right of appeal has been lost by failure to give notice of appeal within ten days thereof.

The defendant contends that under the April 9 judgment "No sentence whatever was pronounced. No punishment was imposed, ..." However, the district court expressly noted that it was acting under the provisions of Title 18, U.S.C. § 4208(b). Under this section the statute clearly states that the term of "commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law." Consequently, at this point the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time that he should have acted. While it is true that defendant could reasonably assume that the judge would modify this maximum sentence, the judge was assuredly under no duty to do so. See *United States* v. *Behrens*, 190 F. Supp. 799 (D.C.S.D., Ind. 1961).

An order will be entered docketing the case and granting the motion to dismiss defendant's appeal.

Order of Court

September 18, 1962

Upon consideration of motion to dismiss appeal, memoranda in support thereof and in opposition thereto.

It is ordered that the appeal be, and the same hereby is, dismissed.

By the Court:

ROGER A. STINCHFIELD, Clerk.

By: /S/ DANA H. GALLUP
Chief Deputy Clerk

Order of Court

October 3, 1962

It is ordered that the petition for rehearing filed by appellant be, and the same hereby is, denied.

By the Court:

/S/ ROGER A. STINCHFIELD,
Clerk.

Rule 32, Federal Rules of Criminal Procedure

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

Rule 35, Federal Rules of Criminal Procedure

The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the

court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 37, Federal Rules of Criminal Procedure

(a)(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Rule 39, Federal Rules of Criminal Procedure

(a) Supervision in Appellate Court. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

Rule 46, Federal Rules of Criminal Procedure

(a)(2) Upon Review. Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the

court of appeals, or by any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts. Pending appeal or certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or by the Supreme Court or by a Justice thereof. Any court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail.

Title 18, U. S. Code, Section 4208

(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determing the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 61-67-F

UNITED STATES

v.

BENJAMIN W. COREY

Notice of Appeal

Name and address of appellant:
Benjamin W. Corey
6 Winter Street
Cochituate, Massachusetts

Name and addres of appellant's attorneys:
Kargman and Kargman
11 Pemberton Square
Boston, Massachusetts

Russell Morton Brown
Brown, Goodpasture, & Block
Federal Bar Building
1815 H St., N. W.
Washington 6, D. C.

Offense: False claims against the Government, Title 18 U. S. Code Section 287.

Concise statement: Defendant was found guilty by jury of 75 counts and committed on April 9, 1962, to the custody of the Attorney General under Title 18 U. S. Code Section 4208(b).

On July 16, 1962, following report from the Bureau of Prisons, defendant was placed on probation for two years, and released from custody.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the First Circuit from the above judgment of July 16, 1962.

BENJAMIN W. COREY, Appellant

by _____
RUSSELL MORTON BROWN,
Counsel

July 19, 1962

District Court Sentencing Procedure of July 16, 1962

(Monday, July 16, 1962
Boston, Massachusetts.)

The Clerk: 61-67-F, Criminal, United States against Benjamin W. Corey.

The Court: Now, Mr. Counsel, as you know as a result of our conferences in my lobby, this case comes back to me with the report concerning the defendant which I have studied and read, and now it is my duty to dispose of the case at this point, finally.

Under our rules, Mr. Corey, I have to inquire whether or not you have anything to say about the disposition of your case at this point.

The Defendant: I want to thank you very much, Your Honor, for according me the opportunity of saying something in behalf of myself, but I should rather leave it in the hands of my attorney.

The Court: You don't care to say anything, and you leave it to counsel.

We have discussed the matter fully for the last half-an-hour in my lobby. But I am compelled to ask you whether or not you wish to say anything in your own behalf before I impose the sentence I am going to impose. Do you care to say anything? If you do, say so.

The Defendant: I still would rather leave it to my attorney, sir.

The Court: Then, Mr. Clerk,—I am going to place you on probation, Mr. Corey, for two years, and I think that is a proper disposition of the case after hearing from the physicians and specialists in the Bureau of Prisons, but there is one thing I would like to say to you. During this probationary period, I wish you would listen to the members of your family, I wish you would take their advice; it would be voluntary on your part. I am not imposing any conditions at all upon you. I want to see you get well. Do you understand me?

The Defendant: Yes, sir.

The Court: And I wish that you would listen to the members of your family and also our Probation Officer, Mr. Griffin. I have gone over the whole case with your brother the Doctor. And they know your case very well.

Pass the order, Mr. Clerk, probation for 2 years.

The Clerk: Benjamin W. Corey, hearken to your sentence as the Court orders it against you. The Court orders that imposition of sentence be suspended and that you be placed on probation for a term of two years.

You will now report to the Probation Officer.

* * * * *

I, A. Joseph Donegan, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript, from pages 1-2 inclusive, constitutes to the best of my skill and ability a true and accurate transcription of my Stenotype notes taken in the above-entitled action.

A. Joseph Donegan
Official Court Reporter

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and rules involved	2
Statement	3
Argument	4
Conclusion	8

CITATIONS

Cases:	
Grabina v. *United States*, 369 U.S. 426	7
Korematsu v. *United States*, 319 U.S. 432	6
United States v. *Behrens*, 190 F. Supp. 799	7
United States v. *De Blasis*, 177 F. Supp. 484	7
United States v. *De Blasis*, 206 F. Supp. 38	7
United States v. *Johnson*, 207 F. Supp. 115	7
Statutes and rules:	
18 U.S.C. 287	3
18 U.S.C. 4208(b)	2, 4, 5
F.R. Crim. P.:	
Rule 32(b)	3, 5
Rule 35	3, 5
Rule 37(a)(2)	3, 4, 5
Rule 43	7
Miscellaneous:	
104 Cong. Rec. 13392	6
Federal Sentencing, Report to accompany H.J. Res. 424, S. Rep. No. 2013, 85th Cong., 2d Sess	6
Federal Sentencing Procedure, Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 85th Cong., 2d Sess. on H.J. Res. 425	7
H. Rep. 1946, 85th Cong., 2d Sess	6

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 569

BENJAMIN W. COREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 8-9; Pet. App. 1a-2a) is reported at 307 F. 2d 839.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1962 (R. 10). A petition for rehearing was denied on October 3, 1962 (R. 12). The petition for a writ of certiorari was filed on November 2, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, where a judge utilized the procedure set forth in 18 U.S.C. 4208(b), the time for noting an appeal ran from the original judgment (which under the statute is for the maximum sentence) or from the time the sentence was modified to impose probation.

STATUTE AND RULES INVOLVED

18 U.S.C. 4208(b) provides:

> If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 32(b) provides:

> A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

Rule 35 provides:

> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

Rule 37(a)(2) provides in pertinent part:

> (2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. * * *

STATEMENT

On December 1, 1961, the petitioner was convicted by a jury in the District of Massachusetts for submitting false claims to the government in violation of

18 U.S.C. 287 (R. 3). On April 9, 1962, with petitioner and his counsel present, judgment was imposed. The judgment recited the plea and the verdict and provided that petitioner be "committed to the custody of the Attorney General or his authorized representative under the provisions of 18 U.S.C. 4208(b)" (R. 6–7). Under this commitment, petitioner was sent to the United States penitentiary at Lewisburg (R. 4).

On July 16, 1962, petitioner was brought before the district judge and, on the basis of the reports submitted by the Bureau of Prisons under the statute, was ordered placed on probation for two years (R. 5–6). This order was entered on July 17, 1962. On July 20, 1962, petitioner filed notice of appeal (R. 1–2).

The government moved to dismiss the appeal on the ground that the notice of appeal was out of time under Rule 37(a)(2), F.R. Crim. P., since judgment had been entered on April 9, 1962 (R. 4–7). The court of appeals docketed and dismissed the appeal on the government's motion (R. 8–10).

ARGUMENT

The question in this case is whether the time for appeal is computed from the date the defendant is committed for study under 18 U.S.C. 4208(b) or from the date sentence is imposed after study, where, as here, the judge decides to modify the sentence on the basis of the study. The language of the statute, its legislative history, and the cases decided thereunder support the holding of the court below that the

time for appeal begins to run at the time of the commitment.

1. The statute in terms provides that the commitment under Section 4208(b) "shall be deemed to be for the maximum sentence of imprisonment prescribed by law" and that the "term of the sentence shall run from date of original commitment under this section." Thus the statute shows that the original commitment is treated as a sentence. Since the possibility of modification is clearly contemplated by the procedure, the purpose of treating the commitment as a maximum sentence must have been to have a sentence which would conclude the criminal proceeding by a final judgment. Moreover, Rule 32(b), F.R. Crim. P., provides that a judgment of conviction shall set forth the plea, the verdict and findings, and the adjudication and sentence. The judgment filed on April 9, 1962, fully complied with these requirements and was properly treated as the final judgment from which appeal had to be taken in 10 days under Rule 37(a)(2).

2. Petitioner argues that because the statute contemplates further action by the judge, the original commitment is not a "final" judgment and hence is not ripe for an appeal. This judgment, however, was final in every significant sense relevant to appeal, for it is the trial and conviction, not the length of sentence (assuming, of course, it is within the statutory provisions), which are the subject of appellate review.

All criminal judgments are subject to reduction within 60 days under Rule 35, F.R. Crim. P., yet the period for appeal begins to run from the date of the

original criminal judgment, not from the date of the reduced sentence. And the legislative history of section 4208(b) indicates that Congress by this Act was merely extending to six months the normal 60-day period in which a court could modify a sentence (H. Rep. 1946, 85th Cong., 2d Sess., pp. 9, 10; 104 Cong. Rec. 13392; *Federal Sentencing,* Report to accompany H.J. Res. 424, S. Rep. No. 2013, 85th Cong., 2d Sess., p. 4). We would point out, moreover, that in a case where imposition of sentence is suspended, the appeal must be taken from the judgment suspending sentence, *Korematsu* v. *United States,* 319 U.S. 432, even though a sentence may later be imposed. Similarly, in the present situation, appeal should be taken from the judgment imposing commitment even though the sentence may later be reduced.

Petitioner notes that in the legislative history of this Act, the Administrative Office of the United States Courts, by letter of July 21, 1958, refers to the first commitment as a "tentative sentence" (Pet. 8–9). The adjective "tentative" is used often in the legislative history, but we suggest this usage stems from the original proposal by the Judiciary Committee on the Administration of Criminal Law. This proposal stated "* * * Upon the imposition of sentence the court may sentence in accordance with other existing provisions of law, or at its option, may impose a tentative sentence to imprisonment generally, which shall be deemed to be for the maximum term prescribed by law; * * *" (Federal Sentencing Procedure, Hearing before Subcommittee No. 3 of the

Committee on the Judiciary, House of Representatives, 85th Cong., 2d Sess., on H.J. Res. 425, p. 39). When Congress finally passed Section 4208(b), however, it eliminated the suggested adjective "tentative," thus evincing an intention that the original commitment was to be final (in the sense of concluding the criminal proceeding).

3. The only reported case dealing with the precise question involved here is in accord with the decision below. *United States* v. *Behrens,* 190 F. Supp. 799 (D. Ind.). The proposition that the original commitment is the final sentence is also supported, however, by cases holding that the defendant need not be personally present when the sentence is later reduced or affirmed. *United States* v. *De Blasis,* 177 F. Supp. 484 (D. Md.); *United States* v. *Johnson,* 207 F. Supp. 115 (E.D. N.Y.).

Petitioner misinterprets (Pet. 5) the government's position in *Grabina* v. *United States,* 369 U.S. 426. The fatal flaw in *Grabina* was not that sentence was deferred, but that both the original commitment and the ultimate sentence were imposed in the absence of the defendant, so that there was a violation of Rule 43, F.R. Crim. P. See *United States* v. *De Blasis,* 206 F. Supp. 38, 40 (D. Md.). Cf. *United States* v. *De Blasis,* 177 F. Supp. 484, 486 (D. Md.). No such problem is presented by this case.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

DECEMBER 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes and Federal Rules Involved	2
Statement	3
Argument	4
I. The Court of Appeals erred in dismissing the Appeal as coming too late, because there was no final, appealable judgment until the district court had fully performed it statutory duty	4
A. Finality of judgments, for purpose of appeal, is measured by completion of the judicial function, not by a defendant's imputed knowledge of results	5
B. The record in the district court clearly shows the original commitment was tentative, and not final, because the court was uncertain as to the proper sentence, and needed "more detailed information", as contemplated by the statute	9
Conclusion	15
Appendix:	
Title 18 U. S. Code § 4208 (a), (c)	17
Federal Rules of Criminal Procedure:	
Rule 37 (a) (2)	18
Rule 39 (a)	18
Rule 46 (a) (2)	18

AUTHORITIES CITED

CASES: Page

Beebe v. *Russell*, 60 U.S. (19 How.) 283, 284 (1857) . . 8
Berman v. *United States*, 302 U.S. 211, 212-213 (1937) 5, 8, 14, 15
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) 8
Corey v. *United States*, 307 F. 2d 839 (1st Cir. 1962) 1
Euziere v. *United States*, 266 F. 2d 88, 91 (10th Cir. 1959) 14
Grahina v. *United States*, 369 U.S. 426 (1962) 13
United States v. *Behrens*, No. 86, October Term, 1963 7, 11
United States v. *Behrens*, 190 F. Supp. 799 (S.D. Ind. 1961) 10
United States v. *de Blasis*, 206 F. Supp. 38, 39-40 (D. Md. 1962) 13
United States v. *Smith*, 331 U.S. 469, 474 (1947) 8, 14
United States v. *Tuffanelli*, 138 F. 2d 981, 985 (7th Cir. 1943) 14, 15

LEGISLATIVE:

Senate Report No. 2013, July 29, 1958 . . . . . 6, 7, 8, 11
U. S. Code Cong. & Adm. News, 85th Cong., 2d Sess., 1958 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 31

BENJAMIN W. COREY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On A Writ of Certiorari To the United States Court of Appeals For the First Circuit

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals, *Corey* v. *United States*, dated September 18, 1962, is reported at 307 F. 2d 839 (1st Cir. 1962), (R. 19). No opinion was written in denying rehearing.

JURISDICTION

The judgment dismissing the appeal as too late, was made and entered September 18, 1962. (R. 19) A petition for rehearing was denied October 3, 1962. (R. 23) The jurisdiction of this Court is invoked under Title 28, U. S. Code, section 1254(1).

QUESTION PRESENTED

Is a commitment to the custody of the Attorney General under 18 U. S. Code § 4208(b) a final judgment for purpose of appeal, or does the judgment become final when the study and recommendations required by that statute have been received by the trial court, evaluated, and used as a basis for final disposition of the case?

STATUTES AND FEDERAL RULES INVOLVED

Title 18 U. S. Code § 4208(b), 72 Stat. 845, reads as follows:

(b) If the court desires more detailed information *as a basis for determining the sentence to be imposed,* the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes *would be helpful in determining the disposition of the case,* shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. *After receiving such reports and recommendations,* the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section. (Italics supplied)

§ 4208(a), (c) and (d), are set out in the Appendix, together with Federal Rules of Criminal Procedure, 37(a)(2), 39(a), and 46 (a)(2).

STATEMENT

Defendant was convicted by jury of submitting false claims to the Government in violation of Title 18, U. S. Code, § 287. The District Court, April 9, 1962, ordered that he be "committed to the custody of the Attorney General of the United States under Title 18, United States Code, 4208(b)" (R. 8-9, 14). No appeal was taken from that order.

That statute, by its express terms is used "If the court desires more detailed information as a basis for determining the sentence to be imposed * * *." It requires a study and recommendation by the Bureau of Prisons within 90 days. The court received and considered this report, and, in accord therewith, on July 16, 1961,[1] suspended sentence, releasing the defendant on probation. (R. 11)

Notice of appeal was given July 19, 1962, seeking substantive review of the trial proceedings (R. 11).[2] The Government moved to dismiss the appeal on the ground that the original commitment by statute was deemed to be for the maximum sentence authorized by law—375 years imprisonment and fines of $750,000;[3]

---

[1] Proceedings in open court took place July 16, though formal entry is dated July 17. The difference is not material.

[2] The docket entries (R. 11) show this Notice of Appeal was filed July 19, while the Clerk's office apparently stamped this July 20 (R. 9). The difference is not material.

[3] This resulted from a finding of guilty on each of 75 counts. Each is punishable by 5 years imprisonment, a $10,000 fine, or both. Title 18, U. S. Code, § 287.

the Government contended, therefore, the defendant was not aggrieved by the reduction of sentence. (R. 13)[4]

September 18, 1962, the Court of Appeals dismissed the appeal, holding that when the defendant was committed to the custody of the Attorney General for study on April 9, 1962, "the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time he should have acted." Accordingly, the right to appeal was held to be lost when the 10-day period for giving notice, prescribed by Rule 37(a)(2), Federal Rules of Criminal Procedure, expired after April 9, 1962 (R. 19).

ARGUMENT

I. The Court of Appeals Erred in Dismissing the Appeal as Coming Too Late, Because There Was No Final, Appealable Judgment Until the District Court Had Fully Performed Its Statutory Duty

When Congress enacted the Federal Sentencing Act of 1958,[5] it gave the district judges an opportunity to secure "more detailed information as a basis for determining the sentence to be imposed." To say that this looks to a future sentence is almost too obvious for statement. The law requires a report within three months, with "recommendations which the Director of the Bureau of Prisons believes would be helpful in

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[4] Following an outstanding military career in counterintelligence during World War II, including a parachute jump into occupied France behind the enemy lines, petitioner was graduated from the Harvard Law School, and practiced law in Massachusetts and New York. He returned to military duty in the Korean War and subsequently experienced some psychiatric maladjustment (R. 2). A knowledge of these matters led the trial court to utilize the procedures of § 4208(b). See *infra*, pp. 9-11.

Petitioner seeks by appeal to reverse the conviction, and thus preserve his professional standing. Counsel represent that such an appeal would present legal questions of substance, and would not be frivolous.

[5] 18 U. S. Code, § 4208(b), Act of August 25, 1958, 72 Stat. 845.

determining the disposition of the case * * *." In the light of this language it requires extensive reaching to conclude that the mere request for such a preliminary report constitutes in itself a "disposition of the case."

A. Finality of Judgments, for Purpose of Appeal, Is Measured by Completion of the Judicial Function, Not by a Defendant's Imputed Knowledge of Results

In dismissing the appeal, the First Circuit held that when the district court on April 9, 1962, (R. 20) committed petitioner to the custody of the Attorney General under Title 18 U.S.C. § 4208(b), by statute he was considered to be under the maximum sentence authorized by law: "Consequently, at this point the defendant was on notice as to the extent of his punishment. If he desired to appeal, this was the time he should have acted." For this reason, it was held, the 10-day period for appeal (Rule 37) began running April 9, and not at the later date, June 16, 1962, when the court had received and studied the reports and recommendations of the Director of the Bureau of Prisons, and, acting on that basis, released petitioner on probation (R. 11). See statement of the District Judge, *infra*, p. 12.

Such analysis would make a judgment final whenever "the defendant was on notice as to the extent of his punishment." This is contrary to every decision known on questions of finality.

Language often quoted on the subject is that of Chief Justice Hughes in *Berman* v. *United States*, 302 U.S. 211 (1937), at page 212:

> Final judgment in a criminal case means sentence. The sentence is the judgment. * * * In criminal cases, as well as civil, the judgment is final for purpose of appeal [213] "when it terminates the litigation between the parties on the merits" and "leaves nothing to be done but to enforce by execution what has been determined."

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Finality is for general purposes the keynote of appellate jurisdiction. Title 28, U. S. Code, § 1291, 62 Stat. 929, June 25, 1948. In spite of the clear statement above quoted, the question of finality still proves difficult.

The statutory scheme contemplated by the Federal Sentencing Act, supra, now Title 18, U. S. Code § 4208, is quite simple: If the court needs more detailed information, it may secure it from the Bureau of Prisons while the defendant is in custody for study and recommendations to be made within 90 days. After the court has received this information, it may release the defendant on probation, affirm the original commitment, which is deemed to be the maximum authorized, or reduce the sentence and commit the defendant under any applicable law.

Plainly, the district court is not through with the case when the defendant is first committed under this statute. The court must receive and study the report and recommendations which "the Director of the Bureau of Prisons believes would be helpful in determining disposition of the case." After that the court's discretion must be exercised to affirm or modify the sentence. Obviously the court must do something; it could not with propriety decline to receive the information from the Bureau of Prisons; and it must then exercise its discretion, if only to affirm what was done before.

The Administrative Office of United States Courts, by letter of July 21, 1958,[6] wrote the Chairman, Senate

[6] Embodied in Senate Report No. 2013, July 29, 1958, to accompany H. J. Res. 424. The legislative history of the Federal Sentencing Act, Title 18, U. S. Code § 4208, is available in U. S. Code Cong. & Adm. News, 85th Cong., 2d Sess., 1958, pp. 3891, et seq.

Committee on the Judiciary, on this legislation, conveying the views of the Judicial Conference,[7] referring to the first commitment as a "tentative sentence".[8] It said:

> The Judicial Conference feels that the sentencing judge *before imposing final sentence* should be able to receive, if he deems advisable, a more complete study of the defendant. (Italics supplied)[9]

The Conference Report[10] itself establishes the principle that final sentence can be imposed only after the study has been made.

> This section [now 4208b] will also permit the court, in particularly complex cases, to commit the defendant to the Attorney General for a 3- to 6-month period for study and observation. *After the court receives a summary of the Attorney General's findings, it may impose final sentence* under any applicable statute. (Italics supplied)

In *United States* v. *Behrens*, No. 86 this Term, the Solicitor General's brief discusses the legislative history in learned and extensive terms.[11] We agree completely with the analysis regarding finality of sentence as coming after the study (Br. 25):

> The House of Representatives eliminated the provisions for flexible parole eligibility and for committing a prisoner for *study prior to final sentence* (104 Cong. Rec. 13391-13401) but they were *re-*

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[7] Id. at p. 3894.

[8] Id. at p. 3897, last paragraph.

[9] Id. at p. 3898.

[10] Id. at p. 3905.

[11] *Behrens* involves not the right to appeal under this statute, but the right to be present in court when the reports are acted upon.

stored by the Senate (104 Cong. Rec. 15353). (Italics supplied)

This legislative history shows, as clearly as language can, that the Congress intended the first commitment to be "tentative" only, and entrusted the district court with discretion to act finally on the reports and recommendations of the Director of the Bureau of Prisons. That was the express view of the Judicial Conference, the Administrative Office of United States Courts, of the Senate Committee, and the Conference Committee.[12]

Fundamental is the rule that so long as the court holds open any question of fact or law, the judgment is not final and cannot be appealed. *Beebe* v. *Russell*, 60 U.S. (19 How.) 283, 284 (1857). "Tentative" decisions are certainly not appealable. *United States* v. *Smith*, 331 U.S. 469, 474 (1947). As Chief Justice Hughes said in the *Berman Case, supra*, the test is whether there is nothing to be done but enforcement of the decree. Plainly, that is not the case here, where the study, reports and recommendations have to be formulated, considered by the court, and acted upon.

It would seem that the correct standard for this case is well stated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949):

> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. * * * So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. * * *
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but

[12] See notes 6 to 10, *supra*.

> steps towards final judgment in which they will merge.

Precisely that situation is presented by the case at bar: the commitment is for study and report; the court imposes final sentence after it is fully informed. The original commitment order is merged in the final disposition. By law the commitment is deemed to be for the maximum, only to leave open to the court the full range of statutory penalty if the report and recommendations so warrant.

B. The Record in the District Court Clearly Shows the Original Commitment Was Tentative, and Not Final, Because the Court Was Uncertain as to the Proper Sentence, and Needed "More Detailed Information", as Contemplated by the Statute

When this matter first came on for sentencing, March 26, 1962, the court was informed there was no recommendation because the probation report was incomplete. There was, however, a clinical record from a Veterans Administration Hospital (R. 1). Medical testimony showed the defendant was in need of psychiatric care and this was a condition of long standing. He had been hospitalized since the date of conviction in December, 1961, and the Veterans Administration physician thought incarceration might interfere with treatment he was then receiving (R. 4-5).

An adjournment was taken for two weeks (R. 6) to April 9, 1962 (R. 7). At that time the United States Attorney recommended commitment under 18 U.S Code § 4208(b).

When the court asked defense counsel if he was familiar with the statute, the answer was (R. 7):

> Yes, I have just read it, if Your Honor please. Section 4208(b) obviously is designed to insure

at least some supervision by way of treatment for a period of time no less than three months.

The Court: Yes.

The United States Attorney made no comment, though he was physically present. No one considered it a final deposition of the matter.

Following a colloquy between the court and counsel, the District Judge said (R. 8):

> Well, I have done something in the interim with respect to facilities for psychiatric and psychological treatment in our institutions and I have a communication here from our Director of the Bureau of Prisons, Mr. Bennett.
>
> It was my intention when the case came on before to impose a jail sentence. But on hearing evidence adduced by counsel, I decided then, not having a complete probation report, to pause and make some investigation on my own account.
>
> Of course I was familiar then and am familiar now with 4208(b) and they have adequate facilities to determine these matters. I think it may be a good idea, a progressive idea, for the Court to know something more about the defendant than I have seen or heard up to date. Mr. Clerk.
>
> [The Court confers with the Clerk.]
>
> The Clerk: Benjamin W. Corey, hearken to your sentence as the Court has awarded it against you. The Court orders that you be committed to the custody of Attorney General of the United States under Title 18, United States Code, 4208(b).

It may be noted that no term of confinement was prescribed by the court, as contrasted with *United States* v. *Behrens*, 190 F. Supp. 799 (S.D. Ind. 1961), where a

specific prison term of years was prescribed. The only order was a general delivery to custody of the Attorney General for study as prescribed by law. This is the "tentative" sentence referred to in the Senate Report,[13] *supra*, and recognized by the Solicitor General's brief in *Behrens, supra*, as (Br. 25) "committing a prisoner for study prior to final sentence (104 Cong. Rec. 13391-13401) * * *."

The case again came before the same District Judge on July 16, 1962.[14] The record shows beyond question that only then was the full statutory duty of the court completed:

> (Monday, July 16, 1962
> Boston, Massachusetts.)
>
> The Clerk: 61-67-F, Criminal, United States against Benjamin W. Corey.
>
> The Court: Now, Mr. Counsel, as you know as a result of our conferences in my lobby, *this case comes back to me with the report concerning the defendant which I have studied and read,* and *now it is my duty to dispose of the case at this point, finally.*
>
> Under our rules, Mr. Corey, I have to inquire whether or not you have anything to say about the disposition of your case at this point.
>
> The Defendant: I want to thank you very much, Your Honor, for according me the opportunity of saying something in behalf of myself, but I should rather leave it in the hands of my attorney.
>
> The Court: You don't care to say anything, and you leave it to counsel.

[13] Note 8, *supra*.

[14] The reporter's original certified transcript of these proceedings has been lodged with the Clerk of this Court.

We have discussed the matter fully for the last half-an-hour in my lobby. But I am compelled to ask you whether or not you wish to say anything in your own behalf before I impose the sentence I am going to impose. Do you care to say anything? If you do, say so.

The Defendant: I still would rather leave it to my attorney, sir.

The Court: Then, Mr. Clerk,—I am going to place you on *probation*, Mr. Corey, for two years, and *I think that is a proper disposition of the case after hearing from the physicians and specialists in the Bureau of Prisons*, but there is one thing I would like to say to you. During this probationary period, I wish you would listen to the members of your family, I wish you would take their advice; it would be voluntary on your part. I am not imposing any conditions at all upon you. I want to see you get well. Do you understand me?

The Defendant: Yes, sir.

The Court: And I wish that you would listen to the members of your family and also our Probation Officer, Mr. Griffin. I have gone over the whole case with your brother, the Doctor. And they know your case very well.

Pass the order, Mr. Clerk, probation for 2 years.

The Clerk: *Benjamin W. Corey, hearken to your sentence as the Court orders it against you.* The Court orders that imposition of sentence be suspended and that you be placed on probation for a term of two years.

You will now report to the Probation Officer. (Italics supplied)

* * * * *

Nothing could more plainly state the court's deferment of sentence from the first session on March 26,

to a later session April 9, when the trial judge stated his own investigation had convinced him it would be proper "for the Court to know something more about the defendant than I have seen or heard up to date." The Court had communicated with the Director of the Bureau of Prisons, and on this basis concluded that he would be "helpful in determining the disposition of the case," as the statute requires.

Only later when the reports and recommendations were received and evaluated did the district court say, "now it is my duty to dispose of the case at this point, finally."

Up to then the matter was tentative, incomplete; on July 16 it became final. Notice of appeal was filed July 19, clearly on time (R. 11).[15]

In the only case under this statute which has reached this Court before, *Grabina* v. *United States,* 369 U.S. 426 (1962), the Solicitor General conceded error in failure to afford the defendant any right of allocution. His memorandum is quoted in *United States* v. *De Blasis,* 206 F. Supp. 38, 39-40 (D. Md. 1962); it shows the same lack of finality in the first commitment. The Solicitor General said (p. 40):

> The trial judge obviously believed that he was *deferring sentence to await reports* under 18 U.S.C. 4208(b), rather than imposing sentence which later would be subject to reduction. (Italics supplied).

Such was the trial court's interpretation here of § 4208(b).

---

[15] It may be noted that the docket entries (R. 11) show only one sentence in this case, to wit, that imposing probation on July 17, 1962; followed by the Notice of Appeal July 19.

C. Orderly Administration of Criminal Justice Requires Deferment of Appeal Until the District Court Has Completed Its Action

In order to make this statute serviceable, the District Courts must be able to call for the advisory help of the Bureau of Prisons. They cannot do so if the simple act of referring the matter is to be considered a final appealable judgment. If it be final, notice of appeal must be given within 10 days under Rule 37(a)(2). The entire case is then moved to the Court of Appeals (Rule 39, Federal Rules of Criminal Procedure) to run a course which may extend for a year or more. The District Court's jurisdiction is ended. *United States* v. *Smith*, 331 U.S. 469, 474 (1947); *Berman* v. *United States*, 302 U.S. 211, 214 (1937); *Euziere* v. *United States*, 266 F. 2d 88, 91 (10th Cir. 1959); *United States* v. *Tuffanelli*, 138 F. 2d 981, 984 (7th Cir., 1943). The Bureau of Prisons' reports and recommendations cannot be followed or applied because the trial court's hands are stayed until the appellate court's mandate is received, possibly years later. *United States* v. *Smith, supra; Berman* v. *United States, supra.* In the *Smith Case, supra,* this Court directed extraordinary writs of mandamus and prohibition, to prevent a District Judge from exercising jurisdiction after the cause had been appealed.

The notice of appeal may postpone the study indefinitely, for the appellant is plainly entitled to bail pending appeal. Rule 46(a)(2), Federal Rules of Criminal Procedure. Thus a defendant who desires the benefit of the careful study and evaluation intended by Congress, is forced to appeal and remove the matter from the District Court's jurisdiction.

If the referral to the Bureau of Prisons for study be considered a final sentence for the maximum term, then many cases will be appealed, which might otherwise result finally in suspended or reduced sentences, with no appeal. Why congest the appellate courts with tentative decisions which the trial court almost certainly will reduce on recommendation of the Bureau of Prisons, in many cases obviating the need or desire to appeal.

This enlightened approach to sentencing was adopted by Congress after careful study, with the assistance of this Court's administrative officers. It appears that the First Circuit has totally disregarded established standards of finality, and the legislative history of the law. It has given no thought to the effect on the administration of justice. To hold that defendant should have appealed when the case was referred to the Bureau of Prisons for study is to require frustration of the statutory purpose.

On the other hand, a defendant so appealing may well face dismissal on a challenge to the appellate jurisdiction on the ground there is more to be done by the District Court, and the decision below lacks finality. *Berman* v. *United States, supra; United States* v. *Tuffanelli,* 138 F. 2d 981, 984 (7th Cir., 1943).

CONCLUSION

The statutory plan contemplates a tentative commitment for study, to be followed by a final sentence. Only then can an intelligent appraisal of the need for appeal be made; only then would a notice of appeal be in order.

It is submitted that the order of the Court of Appeals, dismissing the appeal as too late, should be reversed.

Respectfully submitted,

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August, 1963

APPENDIX

Title 18, U. S. Code:

§ 4208. Fixing eligibility for parole at time of sentencing

(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.

(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary.

It shall be the duty of the various probation officers and government bureaus and agencies to furnish the board of parole information concerning the prisoner, and whenever not incompatible with the public interest, their views and

recommendations with respect to the parole disposition of his case.

(d) The board of parole having jurisdiction of the parolee may promulgate rules and regulations for the supervision, discharge from supervision, or recommitment of paroled prisoners. Added Pub. L. 85-752, § 3, Aug. 25, 1958, 72 Stat. 845.

Rule 37. Federal Rules of Criminal Procedure

(a)(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Rule 39. Federal Rules of Criminal Procedure

(a) Supervision in Appellate Court. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

Rule 46. Federal Rules of Criminal Procedure

(a)(2) Upon Review. Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the court of appeals, or by any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts. Pending appeal or certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or by the Supreme Court or by a Justice thereof. Any court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Argument:	
Introduction and summary	6
When the procedures of Section 4208(b) of the Criminal Code are invoked, the time for appeal runs from the original imposition of sentence	8
A. The scheme of the statute and its legislative history indicate that Congress intended the appeal to be taken from the judgment embodying the initial sentence	8
B. The initial commitment qualifies as a "final judgment" for purposes of appeal	13
C. Fairness to the convict requires that he be permitted to appeal from the judgment embodying the initial sentence	16
Conclusion	19

CITATIONS

Cases:

Armstrong v. *United States*, 306 F. 2d 520	13
Berman v. *United States*, 302 U.S. 211	13, 14
Bernal-Zazueta v. *United States*, 225 F. 2d 64	12

707-457—63——1

Cases—Continued Page

Cobbledick v. *United States*, 309 U.S. 323 14
Cohn v. *Beneficial Loan Corporation*, 337 U.S. 541 15
Gore v. *United States*, 357 U.S. 386 15
Grabina v. *United States*, 369 U.S. 426 16
Herman v. *United States*, 289 F. 2d 362, certiorari denied, 368 U.S. 897 15
Hill v. *Wampler*, 298 U.S. 460 14
Korematsu v. *United States*, 319 U.S. 432 14
Miller v. *Aderhold*, 288 U.S. 206 14
Rivera v. *United States*, 318 F. 2d 606 9
Robinson v. *United States*, 313 F. 2d 817 9
St. Louis, Iron Mountain & Southern Railroad Co. v. *Southern Express Company*, 108 U.S. 24 16
Smith v. *United States*, 273 F. 2d 462, certiorari denied, 363 U.S. 846 15
United States v. *Behrens* 190 F. Supp. 799 16
United States v. *Behrens*, No. 86, this Term 8, 10, 11, 12, 16
United States v. *Lecato*, 29 F. 2d 694 15
United States v. *Steiner*, 239 F. 2d 660, certiorari denied, 353 U.S. 936 12
United States v. *Varner*, 283 F. 2d 900 13

Statutes and rules:

72 Stat. 847 9
18 U.S.C. 287 4
18 U.S.C. 4082 ..... 7, 10
18 U.S.C. 4083 7
18 U.S.C. 4086 7
18 U.S.C. 4161–4162 18
18 U.S.C. 4202 ..... 9, 18
18 U.S.C. 4203 ..... 7, 18
18 U.S.C. 4208(a) 2, 9, 10, 18

Statutes and rules—Continued Page
18 U.S.C. 4208(b) 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18
18 U.S.C. 4208(c) 3, 9
28 U.S.C. 1291 13
Rule 32(a), F.R. Crim. P 6, 12
Rule 32(b), F.R. Crim. P 6, 9, 15
Rule 32(c), F.R. Crim. P 6
Rule 33, F.R. Crim. P 6
Rule 34, F.R. Crim. P 6
Rule 35, F.R. Crim. P 7, 10, 12, 13, 18
Rule 37(a), F.R. Crim. P 6, 12, 15
Rule 38(a), F.R. Crim. P 6, 17, 18
Rule 39(c), F.R. Crim. P 6
Rule 39(d), F.R. Crim. P 6
Rule 43, F.R. Crim. P 16
Rule 45(b), F.R. Crim. P 6
Rule 46(a), F.R. Crim. P 7, 17

Miscellaneous:
Judge Boldt, *Recent Trends in Criminal Sentencing*, 27 Federal Probation, March 1963 8
Federal Sentencing Procedure, Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 85th Cong., 2d Sess., on H.J. Res. 425 11
Glueck, *Principles of a Rational Penal Code*, 41 Harv. L. Rev. 453 8
Judge Kaufman, *Enlightened Sentences Through Improved Technique*, 26 Federal Probation, September 1962 8

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 31

BENJAMIN W. COREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 19–20) is reported at 307 F. 2d 839.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1962 (R. 21). A petition for rehearing was denied on October 3, 1962 (R. 23). The petition for a writ of certiorari was filed on November 2, 1962, and was granted on January 21, 1963 (R. 24). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the procedure established by 18 U.S.C. 4208(b), the time for appeal ran from the original commitment (which under the statute is for the maximum sentence) or from the time when the sentence was reduced to probation.

STATUTE INVOLVED

18 U.S.C. 4208 provides:

> § 4208. *Fixing eligibility for parole at time of sentencing.*
>
> (a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine.
>
> (b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment

prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from date of original commitment under this section.

(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary.

It shall be the duty of the various probation officers and government bureaus and agencies to furnish the board of parole information concerning the prisoner, and, whenever not incompatible with the public interest, their views and recommendations with respect to the parole disposition of his case.

STATEMENT

Petitioner was convicted by a jury in the District of Massachusetts on 75 counts charging the making of false claims against the government in violation of 18 U.S.C. 287 (R. 9–11).

On March 26, 1962, the matter came on for sentencing (R. 1). Petitioner's counsel outlined his client's background, which included graduation from Harvard Law School and service in World War II and the Korean War (R. 2). He presented the testimony of a psychiatrist from the Veterans Administration, where petitioner had been hospitalized since his conviction (R. 3–4). It was the doctor's opinion that petitioner needed psychotherapy for a minimum of one or two years, but that this could be obtained without further hospitalization, and that incarceration would serve no purpose (R. 3–6). The trial judge stated that, in the light of these circumstances and in the absence of a full probation report, he would postpone the matter and await a complete probation report and a transcript of the psychiatrist's testimony (R. 6).

On April 9, 1962, a further hearing was had. The government recommended using the procedures prescribed by 18 U.S.C. 4208(b) (R. 7). Petitioner's counsel argued against following that course and

suggested that it would be appropriate to suspend sentence and allow petitioner to continue his present treatment under the supervision of the probation office (R. 7–8). The court asked petitioner whether he wished to say anything about the disposition of the matter and petitioner responded that he had nothing to add (R. 8). The judge then indicated that although he originally had intended to impose a jail sentence,[1] he now was disposed to learn "something more about the defendant than I have seen or heard up to date" (R. 8). Accordingly, the petitioner was sentenced under the provisions of 18 U.S.C. 4208(b) (R. 8–9). On the same date, April 9, 1962, a formal judgment was entered reciting that the defendant was adjudged guilty as charged and that "the defendant is hereby committed to the custody of the Attorney General or his authorized representative under the provisions of Title 18, U.S.C. Section 4208(b)" (R. 14).

On July 16, 1962, after studying the report from the Bureau of Prisons, the court, with the petitioner and counsel present, suspended imposition of sentence and placed the petitioner on probation for two years (R. 11, 13; Pet. Br. 11–12).

On July 19, 1962, petitioner filed a notice of appeal (R. 11, 9–10). The court of appeals, on the government's motion, dismissed the appeal as untimely,

[1] Later, the judge added that his inclination toward a prison sentence had been influenced by his conviction "without the slightest doubt, that a perjured defense was offered in the defense of this defendant" (R. 9).

holding that the time for appeal ran from the entry of judgment on April 9, 1962 (R. 19–20).

ARGUMENT

INTRODUCTION AND SUMMARY

The normal course of criminal appeals is, of course, well established. After the verdict or finding of guilty, the defendant is given five days in which to ask for a new trial or file a motion in arrest of judgment. Rules 33, 34, Federal Rules of Criminal Procedure. Pending sentence, he may be enlarged on bail. Rule 32(a). Thereafter, "[s]entence shall be imposed without unreasonable delay." Rule 32(a).[1] A judgment of conviction (which includes the sentence) is then signed and entered, Rule 32(b), and the appeal must be noted within the following ten days, Rule 37(a)(2), no enlargement of that period being allowed. Rule 45(b). Unless the time is extended, the record must be filed with the appellate court and the appeal docketed within 40 days thereafter, Rule 39(c), and, after allowing time for preparing briefs and argument, the appeal is heard "as soon * * * as the state of the calendar will permit," in preference to civil cases. Rule 39(d). Pending decision on appeal, a sentence of imprisonment is stayed, unless the defendant elects otherwise. Rule 38(a)(2). Instead of being committed to the custody of the Attorney General for assignment to a jail or penitentiary (see

[1] With obvious concern for avoiding undue delay, the Criminal Rules contemplate the initiation of the pre-sentence report even before verdict. See Rule 32(c)(1).

18 U.S.C. 4082-4083), he is locally detained by the marshal or enlarged on bail. Rule 46(a)(2); 18 U.S.C. 4086. Reconsideration of the sentence originally imposed remains open for two months after affirmance of the conviction on review. Rule 35.

These rules reflect an orderly, prompt and fair procedure. The dominant concern is, quite naturally, that the wrong be righted (if injustice has been done) as quickly as is consistent with deliberate legal process. And, because some delay is unavoidable, every proper effort is made to avoid actual imposition of punishment by staying the sentence and enlarging the defendant on bail, until the appeal is determined. The question presented here is whether, in providing a flexible sentencing procedure under which the trial judge may obtain the benefit of a thorough diagnostic study of the prisoner to enlighten his ultimate decision on the appropriate sentence, Congress, disregarding the usual considerations, meant to alter, for those cases in which the provision is invoked (albeit over the defendant's objection), the carefully drawn rules applicable to every other case by imposing a mandatory period of imprisonment[*] of three or six months before the appellate process can begin.

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[*] As we point out below, in practical operation, Section 4208(b) requires actual incarceration in order to enable the prison authorities to complete their report, which is based, in important part, on observing the convict under prison conditions. Thus, if the right to appeal matures only on re-sentencing after the court has received and considered the report, execution of the original sentence cannot be stayed, nor can the defendant be enlarged on bail, until the ultimate sentence is entered.

Constitutional difficulties aside, such a conclusion is not lightly to be inferred. Nothing compels it; on the contrary, everything points the other way. In our view, the scheme of the statute and its legislative history indicate that no deviation from the usual practice was intended. Nor do notions of finality of judgment require a postponement of the right of appeal beyond the normal delays after conviction. Indeed, looking further to the consequences of the rule urged by petitioner, we submit no different answer is consistent with the fair and orderly administration of criminal justice.

WHEN THE PROCEDURES OF SECTION 4208(b) OF THE CRIMINAL CODE ARE INVOKED, THE TIME FOR APPEAL RUNS FROM THE ORIGINAL IMPOSITION OF SENTENCE

A. THE SCHEME OF THE STATUTE AND ITS LEGISLATIVE HISTORY INDICATE THAT CONGRESS INTENDED THE APPEAL TO BE TAKEN FROM THE JUDGMENT EMBODYING THE INITIAL SENTENCE

The pattern of Section 4208 is to permit, in the discretion of the judge, recourse to penological studies and to a variety of individualized procedures for release.[4] Subsection (a), *supra*, p. 2, provides that "[u]pon entering a judgment" the judge may (1) set a date for eligibility for parole which is less than the

[4] For the historical background, see the government's brief in *United States* v. *Behrens*, No. 86, this Term, pp. 15–26, which deals with the question of whether a defendant must be present when sentence is imposed after the period of incarceration. Also, Glueck, *Principles of a Rational Penal Code*, 41 Harv. L. Rev. 453, 460–461; Judge Boldt, *Recent Trends in Criminal Sentencing*, 27 Federal Probation, March 1963, pp. 3–6; Judge Kaufman, *Enlightened Sentences Through Improved Technique*, 26 Federal Probation, September 1962, pp. 3, 6.

normal one-third of the term (see 18 U.S.C. 4202), or (2), set a maximum sentence and allow the board of parole to determine when the offender shall be eligible for parole (18 U.S.C. 4208(a)(2)). The final method is that provided in 18 U.S.C. 4208(b), invoked here. Under this subsection the maximum sentence is imposed subject to later revision by the judge.[5] In each case, a diagnostic study of the offender is made in a penal institution by the experienced personnel of the Bureau of Prisons, as provided in 18 U.S.C. 4208(c). The pertinent difference between subsection (a) and subsection (b) is that the latter permits the judge, rather than the board of parole, to evaluate the report of the prison authorities and adjust the sentence accordingly. No one doubts that where the parole board fixes the release date the time for appeal runs from the original imposition of sentence. The question here is whether a different rule governs when it is the judge himself who reconsiders the sentence after diagnostic study.

There is no reason to think so. Every indication is that Congress intended the normal practice to be followed in both cases. The text itself points in that direction. The procedures of Section 4208(b) are invoked only after a "judgment of conviction", which necessarily embodies a "sentence" (see Rule 32(b), F.R. Crim. P.), has been entered.[6] The defendant is

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[5] These provisions do not apply to offenses where mandatory penalties are provided. 72 Stat. 847. See *Robinson* v. *United States*, 313 F. 2d 817 (C.A. 7); *Rivera* v. *United States*, 318 F. 2d 606, 609 (C.A. 9).

[6] While the words "Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public re-

committed "to the custody of the Attorney General," as in the case of all sentenced prisoners (see 18 U.S.C. 4082), for a period "deemed to be for the maximum sentence of imprisonment prescribed by law." And it is provided that "The term of the sentence shall run from date of original commitment under this section." These explicit references to the language of sentence and judgment are instructive. They might easily have been avoided. Thus, it might have been provided that, upon determining to utilize the technique now made available, the judge would "defer sentencing" and "remand the prisoner for observation," to be returned for sentencing when the report was received. It is plain Congress chose its words advisedly to convey that the initial commitment was sufficiently "final" to support an immediate appeal.

The legislative history of Section 4208(b) does not directly discuss the question of when to take an appeal. However, the background of the statute (which is discussed in detail in the government's brief in the companion case of *Behrens*, No. 86, O.T. 1963, pp. 15–26) indicates that Congress deemed the initial sentence to be the judgment concluding the criminal case and that any subsequent change in the sentence was viewed as comparable to a reduction of sentence under Rule 35 which would not affect the finality of the original judgment.

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quire that the defendant be sentenced to imprisonment for a term exceeding one year, may * * *" appear in subsection (a), and are not repeated for subsection (b), it is plain they serve as an introduction to the whole of Section 4208.

The original suggestion by the Judicial Conference subcommittee, it is true, described the original commitment as a "tentative" sentence.[7] But, significantly, that descriptive term was eliminated. While the legislative history provides no explanation, the deletion reveals a concern to emphasize that the original sentence was a definite and binding sentence. One may reasonably assume that Congress wished to make sure that the original sentence would support an appeal.[8] That conclusion is reinforced by the fact that, at the same time, Congress added the concluding sentence of Section 4208(b): "The term of the sentence shall run from date of original commitment under this section". Again, it seems to be saying: Since such a sentence is sufficient to support an actual commitment to a penitentiary for "service" of the sentence, it qualifies as a final judgment to support an appeal.

There is no contrary indication in the addition of the explicit alternative given to the trial judge to "affirm the sentence of imprisonment originally imposed." The historical explanation for this change is probably to be found in the traditional fear of the judiciary that it was abdicating its responsibility for

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[7] See proposal set out in the government's brief in *Behrens*, No. 86, O.T. 1963, pp. 22-23.

[8] The references to a "tentative" sentence found in the legislative history stem from the original proposal of the Judicial Conference subcommittee and not the bill that was passed. (See Federal Sentencing Procedure, Hearing before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, 85th Cong., 2d Sess., on H.J. Res. 425, p. 39.) In light of the subsequent deletion, petitioner's reliance on these expressions is misplaced.

sentencing to the executive (see government's brief in *Behrens*, No. 86, this Term, p. 18). The explicit reference to "affirm" may have been deemed necessary to spell out the full freedom of action to continue the maximum sentence, instead of granting reduction or probation. In any event, the mere affirmance of a previously imposed sentence adds nothing for appellate review. If anything, it confirms the government's view that the original commitment was a sentence; otherwise something more than a mere "affirmance" would be necessary to impose a binding sentence.

At all events, the legislative history is clear that section 4208(b) was proposed as an extension of the 60 day period for reduction of a sentence under Rule 35 of the Federal Rules of Criminal Procedure. See the government's brief in *Behrens*, No. 86, this Term, pp. 22-25.[9] Under that rule, the ten day period for taking an appeal runs from the original judgment.[10]

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[9] As we show there, the legislative history is explicit in not requiring a defendant's appearance in court for reduction in sentence. As there explained (pp. 7-8), these questions are closely allied. In view of the requirements of allocution prior to sentence (Rule 32(a)) and the requirement of advising a non-represented defendant of his appellate rights when sentence is imposed (Rule 37(a)(2)), it is difficult to assume that Congress means this subsequent review of sentence, in the absence of the defendant, to qualify as the traditional keystone marking the beginning of the ten day period for perfecting an appeal.

[10] There have been unsuccessful attempts to perfect a direct appeal from a conviction, where a sentence has been reimposed upon revocation of probation, *United States* v. *Steiner*, 239 F. 2d 660, 661 (C.A. 7), certiorari denied, 353 U.S. 936, or where sentence has been imposed for the first time on revocation of probation from a suspended sentence. *Bernal-Zasueta* v. *United States*, 225 F. 2d 64, 68 (C.A. 9).

Indeed, Rule 35 expressly contemplates reduction of sentence after affirmance on appeal or denial of a petition for a writ of certiorari. Thus, the analogy which Congress itself drew to the Rule 35 procedure strongly suggests that it viewed the original sentence under Section 4208(b) as the final judgment for the purpose of appeal, with the concomitant right of a defendant to have bail and be at liberty until the conviction is affirmed.[11]

B. THE INITIAL COMMITMENT QUALIFIES AS A "FINAL JUDGMENT" FOR PURPOSES OF APPEAL

We have shown that Congress strained to provide an initial judgment that would support an appeal. Petitioner argues, however, that, regardless of what was intended, the original sentence is too "tentative" to qualify as an appealable "final judgment." See 28 U.S.C. 1291. We might answer that the Congressional will must be given effect, if need be, by varying the traditional rule of finality for Section 4208(b) cases. But the fact is that the initial judgment entered fully satisfies the usual requirement of finality for appeal. Petitioner's argument is fallacious: it confuses finality of sentence with "finality of judgment."

[11] Of course, where a defendant does not post bail but elects to commence service of sentence pending appeal, there is no reason why the diagnostic study should not be made during the period of incarceration, and redetermination of the sentence can probably proceed even though the case is on appeal. Modifications of sentences have in fact been made under Section 4208(b) while the case was on appeal. See *United States* v. *Varner*, 283 F. 2d 900, 901 (C.A. 7); *Armstrong* v. *United States*, 306 F. 2d 520, 521, fn. 1 (C.A. 10). But see, *Berman* v. *United States*, 302 U.S. 211, 214.

There is no question but that, under the express provisions of Section 4208(b), the district judge must do something further (Pet. Br. 6) after originally imposing the maximum sentence, if it is only to affirm it. But the existence of a power to revise sentence does not alter the fact that the whole process of adjudication of guilt is terminated by the initial maximum sentence. The right of appeal need not wait longer.

Finality for purposes of appeal has long been recognized as "an historic characteristic of federal appellate procedure". *Cobbledick* v. *United States*, 309 U.S. 323, 324. In the criminal law, this doctrine of finality finds expression in the phrase "Final judgment in a criminal case means sentence. The sentence is the judgment" *Berman* v. *United States*, 302 U.S. 211, 212; *Miller* v. *Aderhold*, 288 U.S. 206, 210; *Hill* v. *Wampler*, 298 U.S. 460, 464. But, as the Court explained in *Korematsu* v. *United States*, 319 U.S. 432, 434:

> The "sentence is judgment" phrase has been used by this Court in dealing with cases in which the action of the trial court did not in fact subject the defendant to any form of judicial control. * * * But certainly when discipline has been imposed, the defendant is entitled to review.

The requirement that the cause be terminated by sentence is designed to make certain that the conviction on the merits which is subject to appellate review stands up against various possible pre-sentence remedies such as a motion for new trial, or in arrest of

judgment. To the extent that the conviction may be upset it is still "tentative" and therefore not appropriate for appellate review. See *Cohen* v. *Beneficial Loan Corporation,* 337 U.S. 541, 546. This policy has found expression in the Rules, which specifically provide for the inclusion of a sentence as part of the judgment from which review is to be taken. Rules 32(b) and 37(a)(2),[12] F.R. Crim. P. There is no suggestion, however, that the sentence itself is subject to review. The reduced sentence as such adds nothing for appellate review since the extent of punishment for criminal offenses (within statutory and constitutional limits) is not subject to modification on appeal. *Herman* v. *United States,* 289 F. 2d 362, 369 (C.A. 5), certiorari denied, 368 U.S. 897; *Smith* v. *United States,* 273 F. 2d 462 (C.A. 10), certiorari denied, 363 U.S. 846; See *Gore* v. *United States,* 357 U.S. 386, 393.

The original sentence in this case, which started the term of petitioner's sentence and which in fact subjected the defendant to penitentiary confinement, fully satisfied the standard of finality. A jury had found petitioner guilty, a full probation report had been submitted, counsel had been heard on sentencing, the petitioner had been afforded allocution, the judge had pronounced sentence, a judgment had been entered and petitioner had been physically committed. The time was ripe for review because the litigation between the parties had terminated on the merits.

[12] See long list of citations supplied by Judge Learned Hand in *United States* v. *Lecato,* 29 F. 2d 694, 695 (C.A. 2).

It can make no difference that the judge was going to review the sentence at a later date. Cf. *St. Louis, Iron Mountain & Southern Railroad Co.* v. *Southern Express Co.*, 108 U.S. 24.[13]

C. FAIRNESS TO THE CONVICT REQUIRES THAT HE BE PERMITTED TO APPEAL FROM THE JUDGMENT EMBODYING THE INITIAL SENTENCE

Whatever doubt remains as to the purpose of Congress is surely dispelled by considering the consequences of following the rule suggested by petitioner. Although the present claimant would have it otherwise, fairness to defendants in general requires recognizing their right to test a conviction by appeal immediately after the initial judgment. Congress can have wished no other result.

Like petitioner, we assume that there can be only one appeal from the adjudication of guilt and that the time for appeal begins to run as soon as the right matures. Thus, if petitioner is correct, the convicted defendant for whose case the judge invokes the procedures of Section 4208(b), albeit over his objection, has no choice but to wait three to six months before initiating review of his conviction. That result is

[13] The only decision in addition to that below which directly discusses the problem of the time for appeal is *United States* v. *Behrens*, 190 F. Supp. 799 (S.D. Ind.), where the court held untimely an attempted appeal by *Behrens* (the same defendant involved in No. 86, this Term). Petitioner misinterprets (Pet. Br. 13) the government's position in *Grabina* v. *United States*, 369 U.S. 426. The fatal flaw in that case was not that final sentence was deferred, but that both the original commitment and ultimate sentence were imposed in the absence of the defendant, so that there was a violation of Rule 43, F.R. Crim. P. No such problem is presented by this case.

at variance with the policy favoring prompt appeals in criminal cases, and, more important, it is plainly unfair to the defendant who has been wrongly convicted. The matter would be in a different light if the procedure were optional—if it permitted the defendant to choose the benefit of the investigative study, with the attendant delays, or allowed him to appeal immediately or after re-sentencing, as he wished. But the statute grants no options: the defendant's consent to utilization of the provision is not required, nor is there any suggestion that he may elect when to appeal. Under petitioner's reading, he *had* to wait until a "final" sentence was imposed.

Nor is this all. The enlightened rule of our criminal law is that execution of a sentence will be stayed pending appeal and that the defendant will be enlarged on bail until his case is determined by the appellate court. See Rules 38(a), 46(a)(2). If petitioner is right, that cannot happen when Section 4208(b) is invoked. Not only must the convict wait to test his conviction, but he must wait in the penitentiary. The reason is that the report on the basis of which a redetermination of sentence is made must be completed by the prison authorities, on the basis of examinations, interviews and observations made at the prison. Obviously, this is incompatible with local detention in the custody of the marshal or with enlargement on bail.

These considerations, we submit, compel the conclusion that the usual rule obtains: the right to appeal matures and the time for appeal begins to run from the judgment of conviction which incorporates the

initial sentence. It is no answer to say that the convict's decision whether to appeal may depend on the severity of the sentence ultimately imposed. This very case (in which the sentence was reduced from a long term of years to probation) illustrates how rarely that consideration is determinative. When it is, the defendant can probably note his appeal immediately, elect to begin serving his sentence, see Rule 38 (a)(2), so as to permit the investigative study to be made, and, upon re-sentencing, abandon the appeal if the original sentence is then so reduced as to render further prosecution of the appeal not "worthwhile." More often, the exercise of the right of appeal will not, as it should not, depend on the length of the sentence, or the probability of its being reduced.

In a real sense, the ultimate determination of the sentence actually to be served usually occurs after affirmance of the conviction. Whether made by the prison authorities through allowances for "good time" (18 U.S.C. 4161–4162), by the parole board (18 U.S.C. 4202–4203, 4208(a)), or by the sentencing judge pursuant to a reduction of sentence under Rule 35 or by redetermination under Section 4208(b), the question of punishment is properly discrete from the issues on appeal from the conviction. The short of it is that the avenue of appeal is designed for those who are innocent or have been convicted without a fair trial. Section 4208(b)—a statute designed for rehabilitation of offenders—should not and cannot be construed to

require one who asserts his innocence to spend months in a penitentiary under the surveillance of penologists before initiating an appeal.'

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

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